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August 26, 1977

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The Honorable Dave Babbitt
Mohave County Attorney
Courthouse
Kingman, Arizona 86401

RE: County Improvement Districts, Title 11,
Chapter 5, Articles 1 and 1.1,
Arizona Revised Statutes - 77-175 (R76-467)

Dear Mr. Babbitt:

In November, 1976, your predecessor, Judge Gary Pope, requested an interpretation of the subject county improvement district statutes to assist your office in advising the Mohave County Board of Supervisors whether it can or should authorize the formation of an improvement district for the purpose of constructing or acquiring facilities in the particular manner contemplated by the petitioner.

As we understand it, an improvement district has already been formed in Mohave County at the request of the same petitioner, improvements have been constructed and acquired, and bonds have been issued pursuant to the subject statutes. Your question, broadly stated, is whether the existing district or any other improvement district should be permitted to construct or acquire improvements and to issue bonds in the same manner as was done in that case.

We understand the determinative facts to be as follows. The owner of a large parcel of land, who intends to subdivide his property, petitions the Board of Supervisors for the formation of an improvement district under Article 1, Chapter 5, Title 11, Arizona Revised Statutes (Article 1). The subdivider, who normally is responsible for providing amenities such as streets, curbs and utility distribution facilities, desires to construct the facilities himself, but to finance the construction through the improvement district laws and, in particular, through the alternative financing procedures of Article 1.1, Chapter 5, Title 11, Arizona Revised Statutes (Article 1.1).

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There are two unique features in the developer's plan which give rise to your inquiry. First, the improvements are not constructed by the subdivider prior to the resolution of the improvement district to acquire them; in fact, the plans and specifications are prepared, pursuant to the statutory scheme, by the engineer of the improvement district (who, not incidentally, is also the engineer for the subdivider). Second, the district does not put out for public bid the construction of the improvements; instead it makes an "agreement for acquisition of facilities" with the developer/contractor, who proceeds to construct the facilities and sell them to the district as they are completed. Although the transaction is termed an "acquisition" of improvements, it clearly is not an acquisition of existing, completed improvements. In substance, though not in form, the improvement district is contracting with the developer to construct the improvements. The only practical and substantial difference between this transaction and the usual case in which an improvement district itself constructs the improvements is that in this case there is no competitive bidding for the construction contract: the developer or his designee is the contractor.

The issue, then, really is whether the competitive bidding requirements of Article 1 can be avoided if the improvement district "acquires" the improvements pursuant to Article 1.1 in the manner described above, even though the improvements do not exist at the time the district board passes its resolution of intention to acquire the improvements. Although the statutes are not absolutely clear in resolving this issue, we think the answer is that the competitive bidding requirements cannot be avoided in this manner. Accordingly, we advise you that the transaction outlined above should not be authorized in the absence of clear evidence (by way of statutory clarification or amendment) that the Legislature intends to permit non-competitively-bid construction of improvements by a developer pursuant to the provisions of Articles 1 and 1.1. Because we suggest that this transaction not be approved in the absence of legislative clarification, we find it unnecessary to treat your other questions--most of which would be resolved by such additional legislation.

For your assistance, we are outlining our reasons for concluding that Article 1.1 should not be used in the manner described above.

Article 1.1 was enacted in 1975 (really, re-enacted in anticipation that the first version would be invalidated by the Supreme Court because of a title defect as it was in White v. Kaibab Road Improvement District, 113 Ariz. 209, 550 P.2d 80 (1976)), to modernize the financing of construction

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of improvements by county improvement districts, thereby stimulating competitive bidding and lowering the cost of construction. See 1971 Ariz. Sess. Laws, Ch. 127, § 1 (the purpose clause of the version of Article 1.1 which was invalidated). Under the pre-existing Article 1 procedures, assessments are made after the work is completed and the contractor is paid in bonds, which he must sell to realize cash. In contrast, the new Article 1.1 procedure permits assessments prior to the construction work and permits paying the contractor in cash. The "front end assessment" procedure was validated by the Court of Appeals in 1975. White v. Kaibab Rd. Improvement Dist., 24 Ariz.App. 258, 527 P.2d 986 (1975); vacated on other grounds, 113 Ariz. 209, 550 P.2d 80 (1976).

We believe that the legislature intended to require competitive bidding on improvement construction, whether financed under either Article 1 or Article 1.1. Legislative intent to require competitive bidding can be inferred from examination of the California statutes which provided a model for Article 1.1. The California Municipal Improvement Act of 1913, as amended in 1940, has been construed by the Attorney General of California as precluding acquisition of improvements which are not already installed at the time the political subdivision directs preparation of the engineering report (cf. A.R.S. § 11-761.C). 40 Op. Calif. Atty. Gen. 125 (1962).

Concededly, the California provisions are more explicit on this point than their Arizona counterparts. However, we are unable to conclude that the Arizona act should be construed differently merely because it is less explicit. In fact, Article 1.1 in its entirety is less detailed than the California act.

It seems clear that the California act, in permitting the acquisition of improvement already installed, was intended to allow political subdivisions to acquire public utility facilities and to acquire any other improvements which had been constructed prior to and independently of the formation of an improvement district. We see no reason to conclude that the Arizona Legislature intended the radical departure from the California practice that would be required if Article 1.1 were construed as the developer contends it should be. Nowhere in the legislation itself or in any extrinsic materials which might be helpful in construing the act have we found any legislative intent to open such a large loophole in the competitive bidding requirements of Article 1 (which must be read with Article 1.1).

It must be apparent to anyone reading Article 1.1 that it cannot stand by itself; it makes sense only when read with Article 1, except as to provisions of Article 1.1 which

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contradict those of Article 1. See A.R.S. § 11-761.A. This means that the competitive bidding requirements of Article 1 must be read into Article 1.1 (except insofar as independently installed improvements may be acquired under Article 1.1, a question not treated by this opinion).

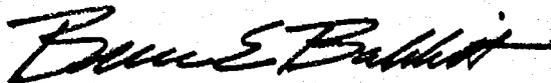
We also note that A.R.S. § 11-711.A. provides:

A. Before ordering an improvement authorized by this article, the board of directors of the district shall pass a resolution of intention so to do, briefly describing the improvement. By the resolution of intention, and the proceedings subsequent thereto, one or more of the improvements may be made on one or more streets or any portion or portions thereof and shall constitute one improvement and be constructed under one contract. If any such work is already done for any lot, the lot shall be excepted from the assessment therefor to the extent of the work done.

(Emphasis added.)

Since the provisions of A.R.S. § 11-711 are expressly incorporated into Article 1.1, A.R.S. § 11-761.F, it could be argued that Article 1.1 does not authorize the acquisition of any existing improvements, even if such improvements had been constructed prior to, and independent of, the formation of the district. On the facts presented, we need not reach that issue; our advice in this opinion is that Article 1.1 should not be used as a vehicle for financing new improvements through purchase without competitive bidding.

Very truly yours,



BRUCE E. BABBITT
The Attorney General

BEB:CSP:amr