

**STATUTES CITED IN I93-002**

ARS 2-312  
ARS 11-532(A)  
ARS 11-934  
ARS 11-936  
ARS 41-1001  
ARS 41-1001(1)  
ARS 41-1004(A)  
ARS 41-1041

**OPINIONS CITED IN 93-002**

I83-114  
I84-053



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June 23, 1993

The Honorable Richard Mahoney  
Secretary of State  
State Capitol, West Wing  
1700 West Washington, 7th Floor  
Phoenix, Arizona 85007

Re: I93-002 (R93-009)

Dear Mr. Mahoney:

You have asked whether the 1986 amendments to the Arizona Administrative Procedures Act ("the APA"), Arizona Revised Statutes Section 41-1001 et seq., change the conclusion in Attorney General Opinion I84-053 that county parks commission rules must be certified by our office and filed with the Arizona Secretary of State. For reasons that follow, we conclude that county parks rules need not be certified by the Arizona Attorney General under the APA, nor must they be filed with the Secretary of State. In addition, we believe that the Legislature should be requested to resolve the conflict between A.R.S. § 11-936, which subjects county parks rules to the state APA, and A.R.S. § 41-1001(1), which specifically excludes political subdivisions and their administrative units from the APA's rule-making procedures.

In a 1983 Attorney General Opinion, this office concluded that only state agency rules were required to be certified by the Attorney General and filed with the Secretary of State. Att'y Gen. Op. I83-114. That ruling was based on the language of A.R.S. § 41-1004(A) 1/ which, at that time, limited certification to "[e]very rule adopted by each state agency . . . ." In 1984, however, we modified that conclusion by interpreting A.R.S. § 11-936 to mean

1. That statute was repealed by Laws 1986, Ch. 232, § 2A.

that county parks rules must comply with all of the rulemaking requirements of the APA's predecessor statutes. Att'y Gen. Op. I84-053. Section 11-936, A.R.S.,<sup>2/</sup> provides in pertinent part that "[r]ules adopted by the parks commission under the authority of this article shall be adopted in accordance with [the APA]."

Central to our 1984 opinion was that the term "agency" then was broadly defined under the APA as "every agency, board, commission, department or officer, authorized by law to exercise rule-making powers. . . ." A.R.S. § 41-1001(1).

The 1986 amendments to the APA, however, narrowed the definition of "agency." The Legislature specifically excluded from the definition of "agency" political subdivisions of the State and all administrative units of political subdivisions. Section 41-1001(1), A.R.S., now clearly excludes county parks rules from the APA's requirements unless the county parks commission<sup>3/</sup> is acting in concert with a state agency:

Agency does not include a political subdivision of this state or any of the administrative units of a political subdivision, but it does include a board, commission, department, officer or other administrative unit created or appointed by joint or concerted action of an agency and one

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2. Since its adoption, A.R.S. § 11-936 has been technically amended two times. In 1986, the statute was amended to technically conform to the APA's amendments. Laws 1986, Ch. 232, § 22. In 1990 the Legislature again made a technical amendment to A.R.S. § 11-936 by substituting the word "adopted" for the word "promulgated." Laws 1990, Ch. 347, Sec. 2. Neither amendment made substantive changes. The technical changes do not affect the advice contained in this opinion because we do not think that legislative intent can be derived from mere "housecleaning" amendments.

3. Counties are "political subdivisions" of the state. Maricopa County v. Maricopa County Water Conservation Dist., 171 Ariz. 325, 830 P.2d 846 (App. 1991). A county parks commission is appointed by the governing body of a county and therefore is an administrative unit of a political subdivision. See A.R.S. § 11-934.

or more political subdivisions of this state or any of these units.

A.R.S. § 41-1001(1) (emphasis added).

We are therefore faced with a conflict between A.R.S. § 11-936, which purports to require county parks commission rules to be adopted in accordance with the APA, and A.R.S. § 41-1001(1), which excludes parks commissions from the APA.

When the Legislature narrowed the definition of "agency" in 1986 to exclude political subdivisions and their sub-units, the new definition was a part of a bill that completely revised the APA. Laws 1986, Ch. 232. The Legislature's failure to repeal the conflicting language in A.R.S. § 11-936 at the same time that it reenacted and substantially modified the APA seems to have been simply an oversight. The Legislature's most recent comprehensive look at the substantive portions of the APA resulted in a much more detailed definition of "agency," specifically excluding not only political subdivisions of the state but also their administrative units. Therefore, we believe that the APA's amendments express an intent to exclude county parks commissions.

Unfortunately, the Legislature left A.R.S. § 11-936, the conflicting statute, on the books. We can harmonize both statutes, however, by interpreting the phrase "adopted in accordance with [the APA]" in A.R.S. § 11-936 to mean that the parks commission rules are nevertheless excluded from the APA's operation because political subdivisions and their sub-units are specifically excluded.

Only one Arizona case interpreting the APA's definition of the term "agency" has been decided since the passage of the 1986 amendments to the APA. Thompson v. Tucson Airport Authority, Inc., 163 Ariz. 173, 786 P.2d 1024 (App. 1989). That case supports our narrow reading of the term. In Thompson, Division II of the Arizona Court of Appeals read "agency" narrowly to exclude a sub-unit of a municipality from the APA's reach. Id. The court held that even though A.R.S. § 2-312, which authorized the creation of the Tucson Airport Authority (TAA), refers to airport authorities as "agencies of the city and state," the TAA was not subject to the APA. Id. The court reasoned that the APA's definition of "agency" excludes local governmental units, because it "is aimed at those agencies of the state government performing a function of that government." Id. at 174, 786 P.2d at 1025 (emphasis added). It held that the Legislature had demonstrated its "intent that the provisions of the Administrative Procedures Act should prevail over other statutory rules." Id. Similarly, in our opinion, the APA's narrow definition of "agency" should prevail over the conflicting language of A.R.S. § 11-936.

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Our conclusion is also based upon the principle that expression of one or more items of a class in a statute indicates that the Legislature intended to exclude all items of that class that are not expressed. Elfbrandt v. Russell, 97 Ariz. 140, 397 P.2d 944 (1965), rev'd on other grounds, 384 U.S. 11 (1966). Because A.R.S. § 41-1001(1) now provides that political subdivisions and their administrative units are subject to the APA only when acting in concert with a state agency, county parks commissions are therefore not subject to the APA when they are not acting in concert with a state agency.

Our conclusion that county parks commission rules need not be certified by the Attorney General's office and filed with the Secretary of State is bolstered by several other factors: First, because the County Attorney is the legal advisor to the county, A.R.S. § 11-532(A), it is unnecessary for the Attorney General, the State's legal officer, to certify county parks rules. Second, members of the public would not likely look to the Arizona Administrative Register, which contains state agency rules, for information regarding county parks rules. Finally, parks commission rules are subject to local notice and hearing provisions that fulfill the same purposes as many of the APA's provisions. See A.R.S. § 11-936. There is no need to duplicate effort.

For these reasons, we conclude that, under A.R.S. § 41-1041, the Attorney General need not certify county parks rules, nor is it necessary to file them with the Secretary of State. However, because of the conflict between A.R.S. § 11-936 and § 41-1001(1), we suggest that the Legislature either repeal that portion of A.R.S. § 11-936 that subjects county parks rules to the APA or amend the APA to make it clear that county rules are subject to APA notwithstanding the specific definition of "agency" in A.R.S. § 41-1001(1).

Sincerely,



Grant Woods  
Attorney General

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