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ARIZONA ATTORNEY GENERAL

June 6, 1985

The Honorable Reid Ewing  
State Capitol - House Wing  
1700 West Washington  
Phoenix, Arizona 85007

RE: 185-077 (R85-057)

Dear Representative Ewing:

You have asked the proper way of determining how many "real property owners" in a territory proposed to be annexed are necessary to sign an annexation petition pursuant to S.B. 1184, enacted by the 37th Legislature in Laws 1985 (1st Reg. Sess.) Ch. 10, § 1 (S.B. 1184). As explained below, it is our opinion that it is 75% of that number of persons<sup>1</sup> which hold legal title to land within the territory proposed to be annexed and such other property as is immovable and affixed thereto, erected or growing thereon, all of which are subject to municipal taxation upon annexation; except that, in the case of a sales contract or deed of trust, it is the person with the right to possession and equitable title or beneficial interest in such property which is the "owner" instead of the holder of bare legal title.

In the statutes and laws of Arizona, except where the context otherwise requires, the term "real property" is

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1. The term "person" includes a corporation, company, partnership, firm, association or society, as well as a natural person. A.R.S. § 1-215.24.

"coextensive with lands, tenements and hereditaments." A.R.S. § 1-215.28. The terms "tenements" and "hereditaments" are so broad and variously defined, however, that the context of S.B. 1184 requires that "real property" be otherwise defined.<sup>2/</sup>

To read S.B. 1184 as requiring the signature of 75% of all owners of lands, tenements and hereditaments in the territory proposed to be annexed would result in the anomalous situation of persons with only tangential interests in the territory being able to petition for annexation. For example, a judgment creditor entitled to rents from the debtor's property holds a tenement. Wood v. Galpert, 1 Ohio App.2d 202, 204 N.E.2d 384 (1965). Consequently, based on rent accruing from property in the territory he would be a "real property owner" until the judgment was satisfied. Because non-appropriable, percolating groundwater is a hereditament, Neal v. Hunt, 112 Ariz. 307, 541 P.2d 559 (1975), a person who sold his land in the territory but reserved the right to pump such water would also be a "real property owner." A statute is to be given a sensible construction which will accomplish the legislative intent and, at the same time, avoid an absurd result. E.g., State v. Valenzuela, 116 Ariz. 61, 64, 567 P.2d 1190, 1193 (1977). Because it would lead to an absurd result, the term "real property" in S.B. 1184 cannot be construed pursuant to A.R.S. § 1-215.28 as land, tenements and hereditaments.

Words and phrases in statutes should be given their ordinary meaning unless it appears from the context or otherwise that a different meaning controls. E.g., McIntyre v. Mohave Cty., 127 Ariz. 317, 319, 620 P.2d 696, 698 (App. 1980); A.R.S. § 1-213. One commonly recognized definition of "real property" is land and whatever is erected or growing upon, or affixed thereto with some permanency. Black's Law Dictionary at 1096 (5th ed. 1979); National Lead Co. v. Borough of Sayreville, 132 N.J. Super. 30, 331 A.2d 633, 637 (1975); Strobel v. Northwest G.F. Mutual Ins. Co., 152 N.W.2d 794, 796 (N. Dakota 1967). See

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2. "Tenement" is the most comprehensive word of description applicable to real estate. In its original and proper sense it encompasses everything which may be held including land, buildings, leases, rents, offices and peerages, and franchises. The term "tenement" is more commonly applied to houses and other buildings. Black's Law Dictionary at 1316 (5th ed. 1979); 73 C.J.S. Property § 18. "Hereditaments" is defined as things capable of being inherited, be they corporeal or incorporeal, real, personal or mixed including not only land and everything thereon, but also heirlooms and furniture which by custom may descend to the heir with the land. The term is more comprehensive than "land" or "tenements". Black's Law Dictionary at 653 (5th ed. 1979); 73 C.J.S. Property § 19 (1983).

also, George v. Gist, 33 Ariz. 93, 263 P. 10 (1928) (an earthen reservoir for livestock use on the open range is real property); Hereford v. Pusch, 8 Ariz. 76, 68 P. 547 (1902) (a log and brush fence attached to the land is real property). Defining the term "real property" in S.B. 1184 as land and whatever is erected or growing upon, or affixed thereto with some permanency will lead to the sensible result that persons with substantial interest in certain territory will be able to petition for its annexation.

Furthermore, this more limited definition of "real property" is more in line with the apparent legislative intent of S.B. 1184. The bill, in pertinent part, is a moratorium on certain annexations of land pursuant to A.R.S. § 9-471. Section 1, paragraph C excepts those annexations, otherwise pursuant to A.R.S. § 9-471, in which (1) the territory to be annexed is completely surrounded by the municipality, or (2) a municipality is presented with a petition signed by 75% of the real property owners in the territory proposed to be annexed, including the State Land Commissioner if state lands are included in the proposal. A.R.S. § 9-471 provides for annexation based upon a petition signed by owners of at least 50% of the assessed valuation of the real and personal property which would be subject to municipal taxation upon annexation. Similarly, Laws 1978 (2nd Reg. Sess.) Ch. 94, §§ 7 and 8 (expired June 30, 1979) provided for annexation based upon a petition signed by a majority of real property owners in the area proposed to be annexed. Prior to 1954, pursuant to § 16-701, A.C.A. 1939, annexation was based upon a petition signed by owners of at least 50% of the value of the property in a territory proposed to be annexed. These provisions indicate a consistent intention by the Arizona State Legislature that annexation petitioners should be persons with an interest in the territory which would be taxable by the municipality after annexation. There is no reason to believe that intention changed in S.B. 1184.

That the legislature still intended an annexation petitioner under S.B. 1184 to be a person with a taxable interest in the proposed territory is apparent from the specific inclusion in the moratorium exception of the State Land Commissioner as a necessary petitioner when state land is at issue. State land is exempt from taxation. A.R.S. § 42-271. Consequently, it is not a factor in determining whether the owners of sufficient assessed real and personal property value have petitioned for annexation under A.R.S. § 9-471. Because state land would be included in the A.R.S. § 1-215.25 definition of real property, it appears that the legislature in S.B. 1184 intended to refer to taxable real property (i.e., land and those immovable things affixed thereto, erected or growing thereon) and then included state land even though it is tax exempt. If the legislature had intended the more expansive statutory (A.R.S. § 1-215.25) definition of "real property" in the bill, it would not have

been necessary to specifically refer to state land since defining real property as coextensive with land, tenements and hereditaments would certainly result in the inclusion of certain other untaxed property.<sup>3/</sup> See also, Gorman v. City of Phoenix, 76 Ariz. 35, 258 P.2d 424 (1953) (the Arizona Supreme Court in construing an earlier annexation statute, § 16-701, A.C.A. 1939, held that "property" in a territory to be annexed means "real property" or land and those things affixed to and a part of the land sited in such territory which would be subject to taxation by a municipality upon annexation).

Construing the term "real property" in S.B. 1184 as land in the territory and whatever is immovable and erected or growing thereon, or affixed thereto which would be taxable by a municipality upon annexation is also a sensible construction because the "owners" can be easily determined from real property tax records. Although it is the property that owes such taxes and not the owner, Peabody Coal Co. v. Navajo Cty., 117 Ariz. 335, 338, 572 P.2d 797, 800 (1977), information concerning the owner is collected and it is that person to whom notice of valuation is given by the assessor. A.R.S. Title 42, Ch. 2, Art. 2, Assessment.

In addition to title owners of record, purchasers under deeds of trust or sales contracts are treated as owners for purposes of assessment. A.R.S. §§ 42-221 through 42-223, 42-236, 42-241.01, 42-242 and 42-245. It is our opinion that when real property in a territory proposed to be annexed is subject to deeds of trust or sales contracts, the purchasers under such instruments are "owners" for purposes of S.B. 1184 rather than those who hold legal title. Such construction is sensible not only because such persons are ascertainable from tax records but also because they have the same substantial interest in the territory as do holders of legal title who are in possession or enjoy the use of real property sited there.<sup>4/</sup>

As the Arizona Supreme Court noted in Pinkerton v. Pritchard, 71 Ariz. 117, 123, 223 P.2d 933, 937 (1950):

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3. For example, a leasehold interest as a tenement would be included. The legislature has yet to authorize taxation of leasehold interests in general, Navajo Co. v. Peabody Coal Co., 23 Ariz. App. 101, 530 P.2d 1134 (1975). Note that S.B. 1053, enacted by the legislature in Laws 1985 (1st Reg. Sess.) Ch. 264, allows taxation of certain leasehold interests.

4. This construction is also consistent with the definition of "owner" in A.R.S. § 33-1310.7 (Residential Landlord and Tenant Act).

'The word "owner" has no technical meaning; but its definition will contract or expand according to the subject matter to which it is applied. As used in statutes it is given the widest variety of construction, usually guided in some measure by the object sought to be accomplished in the particular instance.'

"Owner" is generally defined as the person having the rights to control, possession and use of property, including the right to transmit the same. Black's Law Dictionary at 996 (5th ed. 1979). Under a binding contract for sale of land, equity treats the purchaser, to whom all beneficial interest passes, as the owner although the seller holds legal title until the transaction closes. Cote v. A.J. Bayless Markets, Inc., 128 Ariz. 438, 443, 626 P.2d 602, 607 (App. 1981). Under an earlier annexation statute, § 16-701, A.C.A. 1939, the court held that a purchaser under a sales contract was the real owner of the property at issue because he was in possession and exercised dominion over it, paid taxes and was equitable owner to the extent of his payments. City of Phoenix v. State of Arizona, 60 Ariz. 369, 377, 137 P.2d 783, 786 (1943). The court analogized the seller, who still held legal title, to a mortgagee. Id.<sup>5/</sup> Similarly, a purchaser under a deed of trust is in possession of the property purchased, exercises dominion, pays taxes and is an equitable owner although the trustee holds legal title as security for the trust beneficiaries. See A.R.S. § 33-801 et seq.; Triano v. First Am. Title Ins. Co., 131 Ariz. 581, 643 P.2d 26 (App. 1982).

The requirement in S.B. 1184 that 75% of the real property owners in a territory proposed for annexation sign annexation petitions in no way distinguishes between types of real property owners. Further, S.B. 1184 does not distinguish between a person who owns a large amount of real property or a number of separate parcels and those who own a small amount of real property or a single parcel. In answer to your specific questions:

1. Each owner of a single piece of real property, where there are multiple owners, is counted as an "owner" for purposes of S.B. 1184. Ferree v. City of Yuma, 124 Ariz. 225, 603 P.2d 117 (App. 1979); Rice v. City of Englewood, 147 Colo. 33, 362 P.2d 557 (1961); State v. City of Reno, 73 Nev. 136, 310 P.2d 850 (1957).

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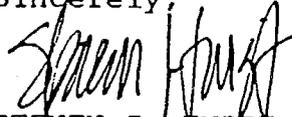
5. In Arizona a mortgagor retains legal title and has possession of the property while the mortgagee has a lien on the property. Lane Title & Trust Co. v. Brannan, 103 Ariz. 272, 277, 440 P.2d 105, 110 (1968).

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2. Whether or not a parcel of land has been subdivided is irrelevant because the exception to the annexation moratorium in S.B. 1184 is dependent on the number of owners of real property in a territory to be annexed, not on the number of units of real property.

3. Each condominium or townhouse owner in a territory proposed to be annexed is a real property owner under S.B. 1184. Id. As explained above, the common area is irrelevant unless it is owned by a separate legal entity such as a home owner's association. In that situation the association would be a real property owner for purposes of S.B. 1184.

Sincerely,



STEVEN J. TWIST  
Chief Assistant  
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SJT:MLG:gm