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January 21, 1988

The Honorable S. H. "Hal" Runyan
Arizona State Senator
State Capitol - Senate Wing
Phoenix, Arizona 85007

Re: I88-012 (R87-160)

Dear Senator Runyan:

You have asked whether certain sections of the 1987 capital outlay bill that were determined to violate the constitution are severable from the appropriations contained in that bill or whether the entire bill is void. We conclude that the offending clauses are severable and the remainder of the bill is operative and effective.

In Ariz. Atty. Gen. Op. 187-107 we concluded that the requirement of approval by a legislative committee prior to the expenditure of appropriated money violated the separation of powers doctrine of Ariz. Const., art. III. Among the provisions at issue in that opinion were sections 1 and 2 of the capital outlay bill, Laws 1987 (1st Reg. Sess.) Ch. 335. Those sections provide in pertinent part:

Section 1. Capital outlay appropriations;
planning and land acquisition

A. The sum of \$1,500,000 is appropriated for fiscal year 1987-1988 from the capital outlay stabilization account to the department of administration, and the director of the department of administration shall use the monies appropriated, subject to prior approval by the joint committee on capital review, for any of the following purposes:

1. Land acquisition by the department of administration.

2. Planning for the construction of state facilities.

3. Acquisition of state facilities in the governmental mall area.

B. The sum of \$3,000,000 is appropriated for fiscal year 1987-1988 from the state general fund to the department of administration which shall be applied first toward the purchase of the Shrine temple and thereafter for the state compensation fund buildings and improvements which are located in the governmental mall. Plans for acquisition, demolition, renovation and agency assignment to space within these properties must be approved by the joint committee on capital review.

Sec. 2. Capital outlay appropriations; major maintenance and repair of state buildings

A. The amounts appropriated in this section appropriated for fiscal year 1987-1988 and shall be used by the applicable agency for major maintenance and repair activities for state buildings in accordance with title 41, chapter 4, article 7, Arizona Revised Statutes. The monies may only be used for maintenance and repair of buildings on the state building inventory approved by the joint committee on capital review. The monies appropriated in this section may not be spent on infrastructure replacement or repairs unless specific approval is given by the joint committee on capital review.

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C. The sum of \$5,491,800 is appropriated from the capital outlay stabilization account to the department of administration for appropriate allocation to the state agencies

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for necessary building renewal. The allocations made from the appropriation in this subsection may be modified by the director of the department of administration, subject to prior approval by the joint committee on capital review, to conform with building systems established pursuant to section 41-793.01, Arizona Revised Statutes.

Laws 1987 (1st Reg. Sess.) §§ 1 and 2 (emphasis added).

The underscored portions of the bill were found to violate the separation of powers doctrine of the Arizona Constitution in our previous opinion. Ariz. Atty. Gen. Op. I87-107. You ask whether the appropriations made in the bill remain available for expenditure or whether they must fall with the offending portions.

Severability is a question of expressed legislative intent and practicality. The test has been generally stated:

if the valid parts are independently effective and enforceable as law and if the valid and invalid portions are not so intimately connected as to raise the presumption that the legislature would not have enacted the one without the other and if the invalid portion was not the inducement for the passage of the entire act, the court will not disturb the constitutional portion of the act.

McCune v. City of Phoenix, 83 Ariz. 98, 106, 317 P.2d 537, 542 (1957).

The pivotal question is would omission of the clauses requiring approval by the joint committee on capital review ("JCCR") render the apparent intent of the legislature in enacting the capital outlay bill incapable of fulfillment. Selective Life Insurance Company v. Equitable Life Assurance Society, 101 Ariz. 594, 422 P.2d 710 (1967); Iman v. Southern Pacific Company, 7 Ariz. App. 16, 435 P.2d 851 (1968).

The purpose of the bill appears to be to provide money for land, buildings and improvements for various state agencies. That purpose is capable of fulfillment without the requirement of approval of individual expenditures by a

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legislative committee. If there is nothing in the bill which gives rise to a presumption that the legislature would not have enacted the appropriations without the JCCR approval requirements, such a presumption should not be made. See, e.g. State ex rel. Berger v. Superior Court, 106 Ariz. 365, 476 P.2d 666 (1970).

In United States v. Jackson, the Supreme Court stated the test as follows:

Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

390 U.S. 570, 585, 88 S.Ct. 1209, 1218, 20 L.Ed.2d 138, 149 (1968), quoting from Champlin Refining Company v. Corporation Commission, 286 U.S. 210, 234, 52 S.Ct. 559, 565, 76 L.Ed. 1062 (1932). The Jackson court looked to the history of the act to answer the inquiry. The court stated it was difficult to imagine a more compelling case for severability in that Congress had previously enacted the statute at issue without the unconstitutional feature.

Similarly, there are numerous occasions where the Arizona Legislature has made appropriations from the capital outlay stabilization account without provisions requiring JCCR approval of expenditures. E.g. Laws 1983 (1st Reg. Sess.) Ch. 302, §§ 1, 2 and 3; Laws 1982 (2nd Reg. Sess.) Ch. 283, § 1. It cannot be presumed that the legislature would not have enacted the capital outlay bill absent the provisions for JCCR approval, because the legislature has done so in the past. See, State v. Snyder, 25 Ariz.App. 406, 544 P.2d 230 (1976).

It is a cardinal rule of statutory construction to save and not to destroy. Tilton v. Richardson, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971). Declaring an entire statute invalid because certain provisions are unconstitutional is a measure courts take only when it is clearly necessary. Cohen v. State, 121 Ariz. 6, 588 P.2d 299 (1978); State v. Snyder, 25 Ariz.App. 406, 544 P.2d 230 (1976).

In Ariz. Atty. Gen. Op. I87-107 we applied a test for determining whether the separation of powers doctrine had been

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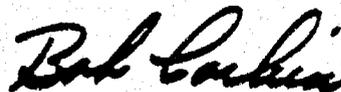
breached. The Arizona courts adopted that test from State ex rel. Schneider v. Bennett, 219 Kan. 285, 547 P.2d 786 (1976). The Bennett case held that certain statutory duties of the state finance council were unconstitutional, including the authority to exercise control over an agency head with regard to plans, specifications and contracts involving the construction of repair of public buildings. See Ariz. Atty. Gen. Op. 187-107 at page 6. Although Bennett did not specifically address the severance issue, it must have determined that the council's unconstitutional authority was severable from the appropriations and other enactments because the court issued the following judgment:

It is further the judgment of this court that upon the filing of this opinion the duties of the state finance council involving the supervision of the department of administration and its various divisions shall devolve upon and be exercised by the governor as the head of the executive department of this state until such time as the legislature shall by statute adopt a new legislative plan or scheme.

547 P.2d at 800.

We conclude that the offending clauses in the 1987 capital outlay bill are capable of being severed from the remainder of the act without rendering the appropriations unworkable or preventing fulfillment of the purpose of the act. We also conclude that nothing in the act, or in previous capital outlay acts, evidences a legislative intent that the appropriations not be operative without the JCCR approval clauses. Therefore, we conclude that the unconstitutional clauses are severable, and the remainder of the act is operative and effective.

Sincerely,



BOB CORBIN
Attorney General

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