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July 14, 1986

The Honorable Alan Stephens
Arizona State Senator
State Capitol - Senate Wing
Phoenix, Arizona 85007

The Honorable Doug Todd
Arizona State Representative
State Capitol - House Wing
Phoenix, Arizona 85007

Re: I86-075 (R85-120)
(R85-136)
(R86-010)

Dear Senator Stephens and Representative Todd:

You have inquired whether revenues from the county transportation excise taxes and the public transportation excise taxes authorized by Laws 1985 (1st Reg. Sess.) Ch. 308 are subject to either the counties' constitutional spending limit or to the counties' statutory budgeting process.

Laws 1985 (1st Reg. Sess.) Ch. 308 authorizes a county wide transportation excise tax as a means of providing substantial funding for transportation purposes. Although all counties are empowered to impose the transportation excise tax, the procedures for creating it, the mechanics of disbursing it and the authorized expenditures vary depending on county size. The act establishes the tax and distribution provisions in three separate statutory schemes. The first is for counties with a population of 1,200,000 or more persons (Maricopa County). The next is for counties with a population of more than 400,000 but less than 1,200,000 persons (Pima County). The third provision applies to counties with a population of 400,000 or fewer persons (all counties other than Maricopa and Pima). The act also authorizes a public transportation excise tax for counties

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with a population of 1,200,000 or more persons. We have received separate opinion requests asking about the application of the constitutional spending limitation to the newly authorized taxes for each category of county. We have consolidated our responses and issued a single opinion because of the similarity in subject matter. However, we will address the issue separately for each category of county. We begin with these issues as applied to Maricopa County.

I. Counties With Populations of 1,200,000 or More Persons (Maricopa).

Pursuant to Section 30 of Chapter 308, the Board of Supervisors of the county may order a county wide election to be held at any time after September 10, 1985 and no later than October 31, 1985 for the electorate to vote on the imposition of a county transportation excise tax within the county. If approved by the voters, the tax would be imposed by A.R.S. § 42-1482, and the net revenues from the tax would be deposited in the regional area road fund (RARF) pursuant to A.R.S. § 28-1594.01.

A.R.S. § 28-1594.01(A) provides as follows:

A. All transportation excise tax monies collected pursuant to § 42-1482 in a county with a population of one million two hundred thousand or more persons shall be immediately transferred by the officer collecting the monies to the state treasurer who shall deposit the monies in a fund designated for the county as the regional area road fund. The state treasurer shall hold all monies in such fund as a trustee for the county. Except as provided in this section, the beneficial interest in such fund shall be the county which levied the transportation excise taxes Monies and investments within the regional area road fund may be used and expended only as provided in this article. No appropriation of any nature may be required before the expenditure of any monies from the

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fund. In any instance in which payment shall be made from the regional area road fund, the state treasurer may do so by check without the necessity of any warrant or voucher. Subject to the powers granted to the board in chapter 15, article 1.1 of this title, the director shall administer monies deposited in the regional area road fund.

In addition, A.R.S. § 42-1491 authorizes the imposition of a public transportation excise tax for Maricopa County. This tax, if approved by a majority of the qualified electors in the county could be imposed on or after January 1, 1989. The net revenues collected from the public transportation excise tax are to be deposited directly into the public transportation fund established under A.R.S. § 28-2502(C). The public transportation fund is under the jurisdiction of the governing board of the regional public transportation authority. A.R.S. § 28-2502(D).

First, you ask whether expenditures from either the RARF or the public transportation fund are subject to the counties' constitutional spending limit. The question whether the expenditures from the RARF and from the public transportation fund are subject to the counties' expenditure limitation is governed by art. IX, § 20 of the Arizona Constitution. Art. IX, § 20 imposes the expenditure limitation on expenditures made from local revenues, and also provides for certain expenditures to be excluded from the limitation.

Art. IX, § 20(3)(d) defines "local revenues" as follows:

"Local revenues" includes all monies, revenues, funds, fees, fines, penalties, tuitions, property and receipts of any kind whatsoever received by or for the account of a political subdivision or any of its agencies, departments, offices, boards, commissions, authorities, councils and institutions

(Emphasis added). Accordingly, we look first to see if the revenue is "received by or for the account of the county" and if so, whether it is nonetheless excepted from the definition.

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The definition sets forth several exceptions two of which are relevant to our analysis.^{1/} Art. IX, § 20(3)(d)(i) provides an exemption from local revenues for bond related expenditures.

(i) Any amounts or property received from the issuance or incurrence of bonds or other lawful long-term obligations issued or incurred for a specific purpose, or collected or segregated to make payments or deposits required by a contract concerning such bonds or obligations. For the purpose of this subdivision long-term obligations shall not include warrants issued in the ordinary course of operation or registered for payment, by a political subdivision.

Art. IX, § 20(3)(d)(viii) provides an exemption from local revenues for expenditures relating to the purchase of land, building or improvements.

(viii) Any amounts or property accumulated for the purpose of purchasing

^{1/}The legislature expressed its intention that the newly authorized transportation excise tax for roads be exempted from the expenditure limitation to the extent they are used for purposes within the two exceptions. Laws 1985 (1st Reg. Sess.) Ch. 308, § 34 provides as follows:

Monies collected pursuant to a county transportation excise tax for roads levied under title 42, chapter 8.3, article 1, Arizona Revised Statutes, as added by this act, which are expended according to the purposes prescribed by article IX, section 20, subsection (3), paragraph (d), subdivisions (i) and (viii), Constitution of Arizona, are exempt from the jurisdiction's expenditure limitation.

Although the legislature cannot deem any revenues outside the limitation contrary to the constitution, the section is consistent with the constitution.

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land, buildings or improvements or constructing buildings or improvements, if such accumulation and purpose have been approved by the voters of the political subdivision.

The phrase "purchase of land, buildings or improvements" includes the purchase of highway construction. See, Keeler v. Commonwealth Department of Transportation, 424 A.2d 614, 616 (Penn. 1981) ("It is a fundamental principle of law that highways are real property."); Kozikowski v. Delaware River Port Authority, 397 F. Supp. 1115, 1122 (D.N.J. 1975) (A bridge is an improvement to real property.); Richards v. Union Building and Construction Corp., 325 A.2d 831, 832 (N.J. Super. 1974) ("It is settled that road construction is an improvement to real property"). Accordingly, highway construction expenditures are within the exception articulated in subsection viii.

The RARF established by A.R.S. § 28-1594.01 is divided into three separate accounts, i.e., the bond account, the construction account and the bond proceeds account. Pursuant to A.R.S. § 28-1594.01(G) and (H), the State Treasurer is required to deposit certain monies from the construction account into the public transportation fund, a subfund established under A.R.S. § 28-2502. Except for the monies from the construction account that are deposited in the public transportation fund, the purposes for which RARF monies may be spent are governed by A.R.S. § 28-1594.01, subsections (D), (E) and (F). Subsection (D) dictates that "[a]ll monies in the bond account shall be held in trust for the owners of the bonds." Monies in the bond proceeds account may be expended either for bond related obligations or for "[t]he design, right-of-way purchase or construction of controlled-access highways" A.R.S. § 28-1594.01(E)(4). Subsection (F) provides that monies in the construction account may be expended only for the design, right-of-way purchase or construction of highways except for specific amounts channeled from the construction account to the public transportation fund.

These authorized uses of the three accounts would be excluded from the counties' expenditure limitation by the exceptions articulated in art. IX, § 20(3)(d)(i) and (viii). That is, all authorized expenditures are either bond related or are for highway construction and thus fall within the

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exceptions. Accordingly, we conclude that all transportation excise tax revenues deposited to RARF except those channeled to the public transportation fund are outside the counties' expenditure limitation because of the uses to which they may be put. They are "received by or for the county" so as to be "local revenues" but fall within the exceptions listed.

Certain monies in the construction account are channeled to the public transportation fund. A.R.S. § 28-1594.01(G) and (H). The public transportation fund is established by the act and is earmarked for public transportation purposes. The fund is established under A.R.S. § 28-2502 and is to fund the regional public transportation authority and its activities. Part of the public transportation fund is set aside for the operation of a regional bus system. A.R.S. § 28-2521. For Maricopa County, part of the public transportation fund is earmarked for planning the establishment of a regional rapid transit system. A.R.S. § 28-2511.

With respect to the question whether the revenues from which the payments to the public transportation fund are to be made, i.e., the distributions from the construction account, and any revenues from the public transportation excise tax levied under A.R.S. § 42-1491, constitute the counties' local revenues, Mountain States Legal Foundation v. Apache County, 146 Ariz. 479, 706 P.2d 1246 (App. 1985), is instructive. That case involved the question whether the county free library system tax and the county's contribution to fire districts could be excluded from the ad valorem tax levy limitation imposed by art. IX, § 19 of the Arizona Constitution. There, construing the language of art. IX, § 19 that the limitation in § 19 does not apply to "ad valorem taxes levied by or for . . . special purpose districts," the Court of Appeals held that the library system is not a special purpose district but that the fire district is.

Also, the Court of Appeals held that the contributions to fire districts are not expenditures within the meaning of art. IX, § 20 because they are not "local revenues" of the county.

The Arizona Constitution defines expenditure as "any authorization for the payment of local revenues." Ariz. Const. art. IX, § 20(3)(c). Local revenues are "funds, fees, fines, penalties, tuitions, property and receipts of

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any kind whatsoever received by or for the account of a political subdivision or any of its agencies, departments, offices, boards, commissions, authorities, councils and institutions." Id. § 20(3)(d). Because the property tax authorized under A.R.S. § 9-1005(A) (Supp. 1984) is levied for fire districts and not for the county or any of its departments or agencies, the revenues are not local revenues and therefore the county's contribution is not an expenditure within the constitutional definition.

Mountain States Legal Foundation v. Apache County, 146 Ariz. at 483 n.7, 706 P.2d 1250 n.7. Revenues are not "local revenues" if levied for a distinct governmental entity and not for the county itself. Thus we examine the character of the entity receiving the funds to determine if the funds are "revenues received by the county" for purposes of art. IX, § 20.

The portion of the transportation excise tax paid to the public transportation fund is not levied "for the county or any of its departments or agencies," but rather for the regional public transportation authority. The regional public transportation authority is established by A.R.S. § 28-2502 for Maricopa County. The government of the authority is vested in a board of directors independent from the county board of supervisors. A.R.S. § 28-2503. In fact, the governing board of the authority would include a county supervisor only if Maricopa County elected to enter into the authority. A.R.S. § 28-2503(A)(2). A.R.S. § 28-2537 provides a tax exemption to the board of directors of a regional public transportation authority since the board is regarded by that provision to be performing a governmental function. In addition, the board of directors have been specifically authorized to adopt an annual budget, adopt an administrative code and issue bonds.

Based on the foregoing, we conclude that the regional public transportation authority and its governing board have an existence separate and apart from the county. Consequently, to the extent that the transportation excise tax monies are distributed by the State Treasurer to the public transportation fund pursuant to A.R.S. § 28-1594.02(G) and (H), such revenues are not "local revenues" and therefore would not be within the constitutional definition in art. IX, § 20. For the same

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reasons, the public transportation excise tax levied pursuant to A.R.S. § 42-1491 also would fall outside of the definition of local revenues in art. IX, § 20 of the Arizona Constitution. The public transportation excise tax is deposited directly to the public transportation fund.

Our conclusion is bolstered by the fact that although the transportation excise tax is technically levied by the county, it is never deposited into any county fund, and the county has no discretion over its use. A.R.S. § 28-1594.01(A). The tax is collected by the Department of Revenue and deposited with the State Treasurer. The amounts distributed to the public transportation fund are then distributed by the State Treasurer directly to the public transportation fund in statutorily required amounts. To that extent, this payment to the public transportation fund is analogous to the contribution from the county's general fund to fire districts that was held not to be received by or for the county in Mountain States Legal Foundation v. Apache County.

Next you ask whether any expenditures from the RARF or the public transportation fund are subject to the counties' budgeting process. Counties are required to prepare and adopt a budget pursuant to A.R.S. §§ 42-302 and 42-303. Pursuant to A.R.S. § 42-302, a county is required to prepare an estimate of proposed expenditures for county purposes, and an estimate of receipts. A.R.S. § 42-302 contemplates including items of proposed expenditures over which the county exercises discretion. Pursuant to A.R.S. § 28-1594.01, the authority to expend monies in the RARF is vested in the Director of the Department of Transportation and, for certain purposes, the State Board of Transportation. A.R.S. § 28-1594.01(A) specifically provides that no appropriation of any nature may be required for the expenditures of any monies from the RARF, and payments may be made by the State Treasurer from the fund without the necessity of any warrant or voucher. The county may not itself expend monies from the fund, and has no independent discretion as to its use.

Because the county does not exercise any discretion over the use of monies in the RARF, and because A.R.S. § 28-1594.01(A) specifically provides for the expenditure of RARF monies without any specific appropriations, it is our opinion that the revenues from the transportation excise tax and the estimated expenditures from the RARF are not required to be

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included in the county's annual budget. Also, because the public transportation fund is under the jurisdiction and control of the governing board of the regional public transportation authority, the revenues from the public transportation excise tax and expenditures from the public transportation fund would not be required to be included in the county's annual budget.

II. Counties With Population in Excess of
400,000 But Fewer Than 1,200,000 Persons
(Pima).

We turn now to the question whether revenues from the transportation excise tax authorized by Laws 1985 (1st Reg. Sess.) Ch. 308 for counties with populations in excess of 400,000 but fewer than 1,200,000 persons (hereinafter Pima) are subject to either the counties' constitutional spending limitation or to the counties' statutory budgeting process.

Laws 1985 (1st Reg. Sess.) Ch. 308 authorizes a county wide transportation excise tax for Pima County as a means of providing substantial funding for transportation purposes. Although created by separate statutory provision, the scheme for Pima County tracks that established for Maricopa County. A review of Chapter 308, as it relates to Pima County reveals that the differences in the levy, collection and distribution of the transportation excise tax for this county are not significant for purposes of the question whether RARF monies are included within the county's expenditure limitation. With respect to the spending limitation, the operation of the tax does not differ in any significant respect from that of counties with a population of 1,200,000 or more persons.

Pursuant to Section 31 of Chapter 308, the Board of Supervisors of the county may order a county wide election to be held at any time after September 10, 1985 for the electorate to vote on the imposition of a county transportation excise tax within the county. If approved by the voters, the tax would be imposed by A.R.S. § 42-1483, and the net revenues deposited in the regional area road fund (RARF) pursuant to A.R.S. § 28-1594.02. Pursuant to A.R.S. § 28-1594.02, the authority to expend monies in the RARF is vested in the Director of the Department of Transportation and, for certain purposes, the State Board of Transportation. A.R.S. § 28-1594.02(A) specifically provides that no appropriation of any nature may be required for the expenditures of any monies from the RARF, and

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payments may be made by the State Treasurer from the fund without the necessity of any warrant or voucher. The county may not itself expend monies from the fund, and has no independent discretion as to its use.

As with the larger county, the RARF established by A.R.S. § 28-1594.02 is divided into three separate accounts, i.e., the bond account, the construction account and the bond proceeds account. Pursuant to A.R.S. § 28-1594.02(G) the State Treasurer is required to deposit certain monies from the construction account into the public transportation fund established pursuant to A.R.S. § 28-2504.

For the same reasons that expenditures from the RARF for larger counties are not included in the counties' expenditure limitation, the RARF expenditures for Pima County are excluded. All authorized uses of the three accounts with the exception of the portion of the construction account channeled to the public transportation fund are either bond related or are for highway construction and therefore fall within the exceptions to the definition of "local revenues" articulated in art. IX, § 20(3)(d)(i) and (viii). A.R.S. § 28-1594.02(D), (E) and (F).

The portion of the transportation excise tax paid to the public transportation fund is not levied "for the county or any of its departments or agencies" but for the regional public transportation authority. The regional public transportation authority is established by A.R.S. § 28-2504 for Pima County. The government of the authority is vested in a board of directors independent of the county board of supervisors. A.R.S. § 28-2505. And, the governing board of the authority would include a county supervisor only if the county elected to enter into the authority. Id. A.R.S. § 28-2537 provides a tax exemption to the board of directors of a regional public transportation authority since the board is regarded by that provision to be performing a governmental function.

The regional public transportation authority and the board of directors of the authority have an existence separate and apart from the county. Consequently, to the extent that the transportation excise tax monies are distributed by the State Treasurer to the public transportation fund pursuant to A.R.S. § 28-1594.02(G), such revenues are not "local revenues" and therefore would not be within the constitutional definition in

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art. IX, § 20. See, Mountain States Legal Foundation v. Apache County, 146 Ariz. at 483 n.7, 706 P.2d at 1250 n.7.

Because the county does not exercise any discretion over the use of monies in the RARF, and because A.R.S. § 28-1594.02(A) specifically provides for the expenditure of RARF monies without any specific appropriations, it is our opinion that the income and estimated expenditures from the RARF are not required to be included in the county's annual budget. See discussion of this issue regarding Maricopa County.

III. Counties With Population of 400,000 or Fewer Persons (All Other Counties).

We turn now to analogous questions regarding the transportation excise tax as it applies to counties with a population of 400,000 or fewer persons.

With respect to counties with a population of 400,000 or fewer persons, Laws 1985 (1st Reg. Sess.) Ch. 308, § 32 authorizes the County Board of Supervisors to call a county wide election for the purpose of approving a county wide transportation excise tax. If approved, the tax would be levied pursuant to A.R.S. § 42-1484. Pursuant to A.R.S. § 42-1484(B) the net revenues collected under that section are to be distributed to the individual county and to the individual cities and towns in the county in the manner determined by the County Board of Supervisors prior to the election and described in the publicity pamphlet for the election. A.R.S. § 42-1484(B) restricts the use of such funds to uses consistent with the use of revenues distributed from the Arizona Highway User Revenue Fund under A.R.S. § 28-1598.

You have asked whether the excise taxes that are distributed to incorporated cities and towns within the county are under the county's expenditure limitation in art. IX, § 20 of the Arizona Constitution, and if not, then are such distributions under the limitation of the individual city or town.

Pursuant to A.R.S. § 42-1484, the tax, once authorized by the electorate of a county, is collected by the Department of Revenue and distributed to the county and the various incorporated cities and towns in the manner previously determined by the County Board of Supervisors and included in

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the ballot. The county cannot thereafter change the distribution. The proceeds of the tax distributed to the cities and towns are never received by the county. The county has no control over how the cities and towns spend the money. The distribution would be spent at the discretion of the individual city or town. The revenues distributed to the incorporated cities or towns within the county would not be considered "local revenues" of the county for expenditure limitation purposes because they would not be "received by the county or any of its agencies, departments or boards." Art. IX, § 20(3)(d); See, Mountain States Legal Foundation v. Apache County, 146 Ariz. at 483 n.7, 706 P.2d at 1250 n.7.

Whether such distributions to the cities and towns are local revenues of the individual cities and towns depends on whether such city or town has adopted, with voter approval, its own expenditure limitation under art. IX, § 20(9) of the Arizona Constitution. If a city or town has adopted an alternative expenditure limitation, then the treatment of the excise tax distribution would depend on the particular provisions adopted by the voters. For cities and towns that have not adopted an alternative expenditure limitation, the excise tax distributions are "received by the city or town" within the provision of art. IX, § 20 of the Constitution. Although the excise tax receipts are local revenues of the city and town recipients, such expenditures would be exempt from the limitation to the extent such expenditures fall within the exclusions of art. IX, § 20(3)(d)(i) or (viii).^{2/} Art. IX, § 20(3)(d)(i) and (viii) provides an exemption from local revenues for bond related expenditures and for expenditures relating to the purchase of land, buildings or improvements.

Pursuant to A.R.S. § 42-1484(B), the revenues from the excise tax can be used only in ways consistent with the use of the Arizona Highway User Revenue Fund (HURF) set forth in A.R.S. § 28-1598. A.R.S. § 28-1598(A) relates to the distribution of highway user revenues and provides that "[t]he revenues in the Arizona highway user revenue fund shall only be expended for the purposes prescribed in article IX, § 14, Constitution of

^{2/}See n. 1 supra for discussion of Laws 1985 (1st Reg. Sess.) Ch. 308, § 34.

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Arizona." That section of the Arizona Constitution limits the use of vehicle, user, and gasoline and diesel tax receipts and in pertinent part provides:

No moneys . . . shall be expended for other than . . . distribution to counties, incorporated cities and towns to be used by them solely for highway and street purposes including costs of rights of way acquisitions and expenses related thereto, construction, reconstruction, maintenance, repair, roadside development, of county, city and town roads, streets, and bridges and payment of principal and interest on highway and street bonds.

Because the excise tax can be used for anything authorized for HURF, we note that certain expenditures authorized for HURF may not fall within the exceptions for bond related expenses and for road construction set forth in art. IX, § 20(3)(d)(i) and (viii). Accordingly, to the extent the excise tax distributions are used for purchase of highway right-of-way or the design and construction of highways, or for bond related expenses, and otherwise meet the requirements of subsections (i) and (viii), they are exempt from the definition of local revenues and therefore exempt from the spending limitation. However, certain authorized uses may not be exempt. Therefore, whether such expenditures are within the spending limitation will depend on the particular use of the funds and will require the same analysis given by a city or town to any HURF expenditure.

Finally, you ask whether the anticipated distributions to the cities and towns should be included in the county's annual budget prescribed in A.R.S. § 42-302. The county does not exercise any discretion or control over the use of monies that are distributed by the state to the cities and towns. Consequently, such distributions to the cities and towns do not have to be included in the county's budget under A.R.S. § 42-302. See discussion of this issue regarding Maricopa County.

IV. Summary.

For counties of population 1,200,000 or more persons and for counties of population between 400,000 and 1,200,000

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persons, we conclude that revenues from the transportation excise tax that are deposited to the RARF are not subject to either the counties' expenditure limitation or to the counties' statutory budgeting process. These revenues are exempt because the authorized uses of the funds fall within the exceptions for bond related or highway construction expenditures or because they are collected for a distinct governmental entity, the regional public transportation authority, and not for the county. Revenue from the public transportation excise tax, authorized for Maricopa County also is collected for the regional public transportation authority and is therefore exempt.

For the other counties, the transportation excise tax revenues are "local revenues" for the county and the city and town recipients of the funds and will be exempt from each entity's expenditure limitation only if the uses to which they are put, fall within the exemptions for expenditures for construction or bond related expenses.

Sincerely,
Bob Corbin
BOB CORBIN
Attorney General

BC:ABS:FQM:pa