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September 10, 1989

Renz D. Jennings, Commissioner
Arizona Corporation Commission
1200 W. Washington
Phoenix, Arizona 85007

Re: I89-079 (R89-093)

Dear Mr. Jennings:

You have requested an opinion as to the effective date of Laws 1989 (1st Reg. Sess.) Ch 305 (H.B. 2267)(the Act), which increases filing fees for annual reports of certain corporations from thirty dollars to forty-five dollars in order to fund an Arizona Arts Program administered by the Arizona Commission on the Arts. Because the Act is for the support and maintenance of the functions of an existing state institution, we conclude that the Act took effect upon its signing by the Governor, June 28, 1989.

The Act amended pertinent parts of A.R.S. § 10-129 as follows, with amendments shown in capital letters:

A. The [Arizona Corporation C]ommission shall charge and collect for in advance and remit to the state treasurer the following fees or penalties:

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3. Filing of annual report of domestic and foreign corporations WHOSE FISCAL YEAR ENDS ON OR BEFORE JUNE 30, 1989, thirty DOLLARS AND CORPORATIONS WHOSE FISCAL YEAR ENDS AFTER JUNE 30, 1989, FORTY-FIVE dollars.

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B. ONE-THIRD OF THE FILING FEES FOR THE ANNUAL REPORT OF DOMESTIC AND FOREIGN CORPORATIONS WHOSE FISCAL YEAR ENDS AFTER JUNE 30, 1989, PAID PURSUANT TO SUBSECTION A, PARAGRAPH 3 OF THIS SECTION SHALL BE DEPOSITED IN THE ARIZONA ARTS TRUST FUND ESTABLISHED PURSUANT TO SECTION 41-983.01.

The Act thus increased fees for corporations filing annual reports whose fiscal years end after June 30, 1989. This fee increase will support an Arizona Arts Program.

The Act created an Arizona Arts Trust Fund to be administered by the Arizona Commission on the Arts for grants under an Arizona Arts Program. Laws 1989 (1st Reg. Sess.) Ch 305, § 3 (A.R.S. § 41-983.01). The Arizona Arts Program was created by the Act "to foster the Arts in Arizona through grants from the Arizona Arts Trust Fund." Laws 1989 (1st Reg. Sess.) Ch. 305, § 4 (A.R.S. § 41-983.02(A)). The Act directed that the Arizona Arts Trust Fund:

shall consist of revenues derived from filing fees collected pursuant to section 10-129. The State Treasurer shall deposit such revenues into the Trust Fund at least quarterly.

Laws 1989 (1st Reg. Sess.) Ch. 305, § 3 (A.R.S. § 41-983.01(A)). These funds were appropriated for continuous use by the Arizona Commission on the Arts as follows, with amendments shown in capital letters:

41-985. Legislative appropriation

The Arizona commission on the arts may accept and expend funds as prescribed by this article and in addition such monies as may be appropriated to it from the state general fund. ANY APPROPRIATIONS MADE TO THE COMMISSION SHALL BE IN ADDITION TO THE AMOUNTS COLLECTED PURSUANT TO SECTION 10-129.

Laws 1989 (1st Reg. Sess.) Ch 305, § 6. Additionally, the sum of \$25,000 was appropriated from the trust fund to the Arizona Corporation Commission for fiscal year 1989-1990 "for purposes of implementing this act." Laws 1989 (1st Reg. Sess.) Ch 305, § 7.

The Act did not take effect as an emergency measure under Ariz. Const. art. IV, pt. 1, § 1(3), because the emergency clause contained in the proposed form of the Act did not receive a two-thirds vote of each house of the Legislature. See Laws 1989 (1st Reg. Sess.) Ch 305, § 8. Nevertheless, we conclude that the Act took effect upon approval by the Governor as a law "for the support and maintenance of the departments of the State Government and State Institutions." Ariz. Const. art. IV, pt. 1, § 1(3).

The Arizona Constitution reserves the power for its citizens to enact or reject statutes at the polls by referendum. Ariz. Const. art. IV, pt. 1, § 1(1) and (3). Consequently, the Constitution requires that measures enacted by the Legislature shall not be operative for 90 days after close of the legislative session "to allow opportunity for Referendum Petitions. . . ." Ariz. Const. art. IV, pt. 1, § 1(3). However, the power of referendum and its 90 day suspension do not extend to "laws immediately necessary for the preservation of the public peace, health or safety, or for the support and maintenance of the departments of the State Government and of State Institutions. . . ." Id. (emphasis supplied). The term "support and maintenance" includes appropriation measures for financial support of existing state institutions. Garvey v. Trew, 64 Ariz. 342, 352, 170 P.2d 845, 851 (1946).

Laws necessary to preserve peace, health, or safety must contain a provision stating that such an emergency exists, and must give immediate effect upon approval by the Governor by a two-thirds vote of each house of the Legislature. Id.; Industrial Commission v. Frohmler, 60 Ariz. 464, 474-476, 140 P.2d 219, 223-224 (1943). Laws for support and maintenance of existing state institutions are not subject to referendum or 90 day suspension and do not require an emergency clause to take effect immediately upon approval by the Governor. Garvey v. Trew, 64 Ariz. at 354-355, 170 P.2d at 852-853.

The Arizona Supreme Court has given the following reasons for exempting support and maintenance laws from the power of referendum:

If an appropriation measure, whether general or special, has to be adopted by a two-thirds vote of the legislature, and with the emergency clause or section, then every appropriation bill not so passed may be held in abeyance by a small minority of the

voters, to-wit, five per cent, and the will of the majority be defeated. One-third of the legislature, and not a majority, would in fact control. We take it that it often happens that a two-thirds vote of the legislature cannot be secured even for the passage of a general appropriation bill. In such event, five per cent of the people could stop all functions of government by filing referendum petitions against appropriation bills. The will of the majority would be defeated until such time as a vote could be taken at a general election. Thus, for instance, under these circumstances all work on the highways could be stopped for many months; the function of every department of state or institution depending upon legislative appropriation could be interrupted. The state university, and other schools depending upon appropriations, would have to close under these circumstances. We would have the situation of a small minority stopping all processes of government.

Id., 64 Ariz. at 352, 170 P.2d at 851-852. Accord, Winebrenner v. Salmon, 155 Md. 563, 142 A. 723, 726 (1928); Detroit Automobile Club v. De Land, 230 Mich. 623, 203 N.W. 529, 530 (1925); State ex rel. Blakeslee v. Clausen, 85 Wash. 260, 148 P. 28, 31 (1915). However, this does not mean that all support and maintenance laws are beyond the power of referendum.

The Arizona Supreme Court has held that support and maintenance appropriations are exempt from referendum and its 90 day suspension only when they support existing functions of state departments or institutions:

If the appropriation is incidental to a measure, giving new or additional power or functions to a department or institution, and for the support and maintenance of such new power or functions, it is subject to the referendum unless passed as an emergency measure.

Garvey v. Trew, 64 Ariz. at 355, 170 P.2d at 853. This means that the Act, in support and maintenance of the Arizona Commission on the Arts, must be an appropriation for existing functions or powers of that state institution, if the Act is to be immediately operative. We conclude that a program for grants to foster the Arts in Arizona is an existing function of the Arizona Commission on the Arts.

As noted above, the Arizona Arts Program was created by the Act to provide grants to individuals and organizations to foster the Arts in Arizona. Laws 1989 (1st Reg. Sess.) Ch 305, § 4 (A.R.S. § 41-983.02). A "grant" is defined in the Arizona Procurement Code (A.R.S. §§ 41-2501 to -2652) as "the furnishing by this state of assistance, whether financial or otherwise, to any person to support a program authorized by law." A.R.S. § 41-2503(12). This is the commonly understood meaning of the term "grant" as it is used in the Act. See "Grant: Public Grant," "Grant-in-Aid," Blacks Law Dictionary 630 (5th ed. 1979). Consequently, the Act would be an appropriation for an existing power of the Arizona Commission on the Arts if the Commission already had the power to furnish assistance to individuals or organizations to foster the Arts in Arizona. We conclude that such power did, in fact, exist.

The purposes of the Commission on the Arts have been broad since it was created. Laws 1967 (1st Reg. Sess.) Ch 132. In pertinent part, A.R.S. § 41-982 lists the powers and duties of the Commission on the Arts as follows:

The commission shall:

B.

1. Stimulate and encourage throughout the state the study and presentation of the performing arts, fine arts, and public interest and participation therein.

. . . .

3. Take such steps as may be necessary and appropriate to encourage public interest in the cultural heritage of our state and to expand the state's cultural resources.

4. Encourage and assist freedom of artistic and scholarly expression essential for the well-being of the arts.

To carry out these purposes the Commission on the Arts had the following powers, among others:

A.R.S. § 41-982. Powers and duties

A. The commission may:

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3. Enter into contracts, within the limits of funds available, with local and regional associations, individuals, organizations and institutions for any services which further the broad objectives of the commission's program.

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5. Make agreements to carry out the purposes of this article.

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We conclude that the above long-standing powers and duties of the Arizona Commission were sufficiently broad to permit grants of assistance to individuals and organizations to foster the Arts in Arizona. Further evidence of this conclusion is that the Act, in creating an Arizona Arts Program, only made the following amendment to the powers and duties of the Commission on the Arts, shown in capital letters:

A.R.S. § 41-982 Powers and duties

A. The commission may:

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4. Accept gifts, contributions and bequests of unrestricted funds FOR DEPOSIT IN THE ARTS FUND OR THE ARTS TRUST FUND from individuals, foundations, corporations, and other organizations or institutions for the purpose of furthering the broad objectives of the commission's program.

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In effect, the Act provides a procedure for implementing an existing function of the Arizona Commission on the Arts and for the additional support and maintenance of such function.

Having determined that the Act's appropriation of funds is exempt from referendum, we must determine whether the Act's increase of fees under A.R.S. § 10-129 to fund the appropriation is likewise exempt. The term "appropriation" does not refer to the acquisition of public funds. It means the setting aside of a certain sum of money from the public revenue for a purpose specified by the legislature. Hunt v. Callaghan, 32 Ariz. 235, 239, 257 P. 648, 649 (1927). An appropriation is thus distinguished from the acquisition of public revenue by a "tax", which is defined as "'the enforced . . . contribution of persons and property, levied by authority of the state for the support of the government and for all public needs.'" Id. (quoting Vol. 8, Words and Phrases, p. 6868). Likewise, the term "appropriation" does not refer to the collection of a "fee", which is the voluntary payment of "a charge fixed by law for the service of a public officer" Kyrene School District v. Chandler, 150 Ariz. 240, 243, 722 P.2d 967, 970 (1986) (quoting Stewart v. Verde River Irrigation and Power District, 49 Ariz. 531, 544-545, 68 P.2d 329, 334-335 (1937)).

A number of states have addressed whether an appropriation for support and maintenance of state government may be referred when it is funded by an increase in fees or taxes. Arizona has not. See cases collected in Annotations, Construction and Application of Constitutional or Statutory Provisions Expressly Excepting Certain Laws from Referendum, 146 A.L.R. 284 (1943), 100 A.L.R.2d 314 (1965).

When an act to increase revenues is for the purpose of funding an appropriation to support existing functions of state institutions, courts have construed the funding statute and the appropriation statute as one appropriation act which is exempt from the power of referendum.^{1/} Kelly v. Marylanders for Sports Sanity, 310 Md. 437, 530 A.2d 245 (1987) (statute

^{1/} Courts have held, however, that such an act must be connected to a valid appropriation to be exempt from referendum as a support and maintenance measure. Heinkel v. Toberman, 360 Mo. 58, 226 S.W.2d 1012, 1016 (1950) (act referable because it increased gasoline tax and allocated the proceeds but did not

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authorizing issuance of bonds for sports stadium); Weinbrenner v. Salmon, 155 Md. 563, 142 A. 723, 725 (1928) ("maintaining the government means providing money to enable it to perform the duties which it is required by law to perform."); County Road Association v. Board of State Canvassers, 407 Mich. 101, 282 N.W.2d 774 (1979) (increased gasoline taxes for state's public transportation system); Boards of County Roads Commissioners v. Riley, 391 Mich. 666, 218 N.W.2d 144, 148 (1974) (increased gasoline taxes to fund "previously authorized and contemplated programs."); Andrews v. Munro, 102 Wash.2d 761, 689 P.2d 39 (1984) (act extending timber taxes beyond previous expiration date); Farris v. Munro, 99 Wash.2d 326, 662 P.2d 821, 827 (1983) (A measure is "support" and not referable when "it is designed to produce revenue for the general fund which in turn supports all of existing state institutions.") See Gravning v. Zellmer, 291 N.W.2d 751 (1980) (court deferred to legislative finding of "support" in exempting from referendum an increase in taxes for state railway system).

We conclude that the funding and appropriation portions of the Act [Laws 1989 (1st Reg. Sess.) Ch. 305] should be construed as a single measure in support and maintenance of the functions of an existing state institution. A contrary result would mean that existing governmental functions requiring additional revenues could be substantially interrupted by a small minority of voters. The support and maintenance provisions of Ariz. Const. art. IV, pt. 1, § 1(3) were intended to avoid such an eventuality. Garvey v. Trew, 64 Ariz. at 352, 170 P.2d at 851-852. Consequently, we conclude that the Act took effect upon approval by the Governor on June 28, 1989.

Sincerely,



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1/cont. appropriate the funds); State ex rel. Haynes v. District Court, 106 Mont. 470, 78 P.2d 937, 942-943 (1938) (act increasing liquor license fees did not appropriate proceeds for any use and was subject to referendum). See also, Lawrence v. Beerman, 192 Neb. 507, 222 N.W.2d 809 (1974) (exemption from referendum for "appropriations or expense of state government" did not apply to a new financing scheme for local public school districts).