STATE OF ARIZONA
OFFICE OF THE
AUDITOR GENERAL

A PERFORMANCE AUDIT
of the

DEPARTMENT OF ADMINISTRATION - FINANCE DIVISION FACILITIES PLANNING & CONSTRUCTION SECTION

JANUARY 1982

A REPORT TO THE
ARIZONA STATE LEGISLATURE

REPORT 82-1

DOUGLAS R. NORTON, CPA
AUDITOR GENERAL

STATE OF ARIZONA
OFFICE OF THE
AUDITOR GENERAL

January 26, 1982

Members of the Arizona Legislature
The Honorable Bruce Babbitt, Governor
Mr. Robert B. Tanguy, Director
Department of Administration

Transmitted herewith is a report of the Auditor General, A Performance Audit of the Department of Administration, Finance Division, Facilities Planning and Construction Section. This report is in response to a January 30, 1980, resolution of the Joint Legislative Oversight Committee. The performance audit was conducted as a part of the Sunset review set forth in A.R.S. §§41-2351 through 41-2379.

The blue pages present a summary of the report; a response from the Director of the Department of Administration and the Assistant Director for Finance is found on the yellow pages preceding the appendices.

My staff and I will be pleased to discuss or clarify items in the report.

Respectfully submitted,

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SUMMARY

The Office of the Auditor General has conducted a performance audit of the Department of Administration, Finance Division (DOA-Finance), Facilities Planning and Construction Section in response to a January 30, 1980, resolution of the Joint Legislative Oversight Committee. This performance audit was conducted as a part of the Sunset review set forth in Arizona Revised Statutes (A.R.S.) §§41-2357 through 41-2379.

The Facilities Planning and Construction Section (FP&C) was created by the Legislature in 1967 and incorporated into the Department of Administration, Division of Finance, in 1973.

Under the provisions of A.R.S. §41-726, FP&C is responsible for maintaining plans prepared by State agencies, inspecting existing State buildings annually and reviewing leases of real property. Additionally, FP&C is required to supervise the planning and construction of new State facilities.

Arizona law requires FP&C to review proposed projects, including leases of real property, and submit a report to the Legislature. However, FP&C lacks authority to review all leases executed by State agencies or to approve or disapprove such leases. As a result, 1) FP&C's review of proposed leases is essentially meaningless, 2) information used in assessing the need for new State construction is inadequate, and 3) State lease expenditures may be excessive and unnecessary. Statutory changes are needed to clarify FP&C's responsibilities and provide FP&C with authority to review proposed leases effectively. (page 11)

FP&C conducts annual site inspections of property leased by the State to identify needs for construction of additional State buildings. These inspections are an inefficient and ineffective use of FP&C staff in that they do not 1) protect the interests of the State by identifying health and safety hazards in all leased facilities, 2) ensure that deficiencies will be corrected when identified, or 3) provide sufficient inputs into the State construction needs assessment process. Additionally, FP&C inspections appear to duplicate, at least in part, inspections performed by other agencies. FP&C should discontinue inspections of leased facilities and reallocate its staff to performing inspections of new building construction. Additionally, statutory changes are needed to 1) specifically exclude leased facilities from inspection, and 2) require all agencies to submit annually to FP&C information used to assess the needs for new construction. (page 23)

INTRODUCTION AND BACKGROUND

The Office of the Auditor General has conducted a performance audit of the Department of Administration, Finance Division (DOA-Finance), Facilities Planning and Construction section in response to a January 30, 1980, resolution of the Joint Legislative Oversight Committee. This performance audit was conducted as a part of the Sunset review set forth in Arizona Revised Statutes (A.R.S.) §§41-2357 through 41-2379.

The Facilities Planning and Construction Section (FP&C) was created by the Legislature in 1967 and incorporated into the Department of Administration, Division of Finance, in 1973.

Under the provisions of A.R.S. §41-726, FP&C is required to maintain plans prepared by State agencies, inspect annually existing State buildings and review leases of real property. Additionally, FP&C is mandated to supervise the planning and construction of new State facilities through

1. Review of proposed projects and improvements;

2. Review of architectural, engineering and construction contracts;

3. Approval of plans and specifications and all changes thereto;

4. Inspection during the course of construction; and

5. Review and approval of progress payments.

FP&C reports annually to the Legislature on 1) the condition and utilization of existing State buildings, and 2) proposed projects, including leases.

A summary of FP&C's activities during fiscal years 1975-76 through 1979-80 are shown in Table 1.

TABLE 1

SUMMARY OF FP&C'S ACTIVITIES DURING FISCAL YEARS
1975-76 THROUGH 1979-80

	Fiscal Year				
	1975-76	1976-77	1977-78	1978-79	1979-80
Inspections performed					
Existing building (Note 1)	4334	4370	4019	2039	2600
Leased facilities	187	158	157	228	253
New construction	369 (Note 2)	413	1019	1640	N/A
Lease agreements reviewed	187	158	157	160	253
Architectural/engineering contracts reviewed	32	45	69	62	60
Construction contracts reviewed	36	71	96	65	59
Plans and specifications reviewed	106	109	148	143	150

Note 1: Includes all State-owned structures such as radio antennas, fences and storage sheds. In FY 1979-80, FP&C discontinued inspections of structures with values less than $1000.
Note 2: Excludes inspections in Capitol Complex.
Source: FP&C Annual Reports, 1975-76 through 1979-80.

As of December 31, 1981, FP&C was authorized nine full-time employees. One position was vacant as of that date. Table 2 contains a summary of FP&C's full-time equivalent employees' (FTE) actual expenditures for fiscal years 1977-78 through 1980-81 and projected expenditures for fiscal year 1981-82.

TABLE 2

SUMMARY OF FP&C's FULL-TIME EQUIVALENT EMPLOYEES' (FTE)
ACTUAL EXPENDITURES FOR FISCAL YEARS
1977-78 THROUGH 1980-81 AND PROJECTED EXPENDITURES FOR FISCAL YEAR 1981-82

	Fiscal Years				
	1977-78	1978-79	1979-80	1980-81*	1981-82 (Projected)
FTE	8	9	9	9	9
Personal services	$127,200	$162,200	$172,800	$189,600	$223,400
Employee-related expenditures	21,900	29,200	31,600	36,000	45,900
Professional & outside services	3,200	700	900	800	1,000
Travel - in State	12,300	16,900	14,500	24,500	25,800
Other operating expenses	14,100	14,900	15,400	16,400	17,400
Equipment			600	800	4,100
Total	$178,700	$223,900	$235,800	$268,100	$317,600

Source: Assistant Director, DOA-Finance.
* Through June 30, 1981.

The Auditor General expresses gratitude to the employees of the Department of Administration, Finance Division, Facilities Planning and Construction Section for their cooperation and assistance during the course of the audit.

SUNSET FACTORS

Nine factors were reviewed to aid in the process of determining whether the Department of Administration, Finance Division, Facilities Planning and Construction Section should be continued or terminated in accordance with Arizona Revised Statutes (A.R.S.) §§41-2351 through 41-2379.

SUNSET FACTOR: OBJECTIVE AND PURPOSE IN ESTABLISHING THE SECTION

There is no explicit statement of legislative intent in the statutes establishing the Facilities Planning and Construction Section (FP&C). A.R.S. §41-726 provides that FP&C

1. Inspect State buildings annually and report to the Legislature on the condition, maintenance and utilization of such buildings;

2. Review proposed projects, facilities improvements and leases and submit a report thereon to the Legislature;

3. Review architectural, engineering and construction contracts before their submission to the Department of Law;

4. Approve plans and specifications and changes thereof for projects and improvements for which funds are appropriated by the Legislature;

5. Review and approve progress payments on major projects and improvements;

6. Inspect projects and improvements during the course of construction to ensure compliance with plans and specifications; and

7. Maintain and update a five-year plan of facility improvements and construction projects which will be required by State agencies.

In addition, statements made by one member of the Legislature indicate that the purpose in establishing FP&C was to protect the interests of the State during the planning, constructing and leasing of facilities which will be occupied by State employees.

SUNSET FACTOR: THE DEGREE TO WHICH THE SECTION HAS BEEN ABLE TO RESPOND TO THE NEEDS OF THE PUBLIC AND THE EFFICIENCY WITH WHICH IT HAS OPERATED

FP&C attempts to respond to the needs of the public by providing information for capital investment planning decisions to agencies, DOA-Finance, the Executive Budget Office and the Legislature.

Planning information is generated through the lease review and inspection functions. Our review revealed that this information is incomplete because not all leased facilities are subject to review and inspection. (pages 13 and 24)

FP&C performs various review and inspection functions to determine that facilities owned and leased by the State are adequate, safe and economical. However, there is inadequate control over lease expenditures because 1) not all leases are subject to review, 2) many leases are reviewed after execution, and 3) FP&C does not review for reasonableness of terms or economy. (page 11) Additionally, inspections do not provide for the elimination of deficiencies in leased facilities. (page 26)

Opportunities exist to improve efficiency by discontinuing inspections of leased facilities and reallocating staff resources to provide more frequent inspections of new construction projects. (page 27)

SUNSET FACTOR: THE EXTENT TO WHICH THE SECTION HAS OPERATED WITHIN THE PUBLIC INTEREST

FP&C is an administrative agency providing services to other State agencies and the Legislature. FP&C attempts to operate in the public interest to the extent that it is able to meet the needs of the public for 1) accurate information for planning purposes, and 2) evaluation of expenditures of State monies for leased space. As noted in the discussion of the previous sunset factor, improvements are needed in both areas.

SUNSET FACTOR: THE EXTENT TO WHICH RULES AND REGULATIONS PROMULGATED BY THE SECTION ARE CONSISTENT WITH THE LEGISLATIVE MANDATE

FP&C does not have statutory authority to promulgate rules and regulations. A.R.S. §41-722 allows for rules and regulations to be promulgated by the DOA-Finance assistant director. Therefore, FP&C could issue rules and regulations through the assistant director but has not done so. There appears to be a need for administrative rules in order to better inform agencies concerning required procedures and provide for agency compliance with those procedures. (page 15)

SUNSET FACTOR: THE EXTENT TO WHICH THE SECTION HAS ENCOURAGED INPUT FROM THE PUBLIC BEFORE PROMULGATING ITS RULES AND REGULATIONS AND THE EXTENT TO WHICH IT HAS INFORMED THE PUBLIC AS TO ITS ACTIONS AND THEIR EXPECTED IMPACT ON THE PUBLIC

As noted previously, FP&C does not have explicit statutory authority to promulgate administrative rules and regulations. Because no rules and regulations have been promulgated, this factor does not apply to FP&C.

SUNSET FACTOR: THE EXTENT TO WHICH THE SECTION HAS BEEN ABLE TO INVESTIGATE AND RESOLVE COMPLAINTS THAT ARE WITHIN ITS JURISDICTION

FP&C has no statutory responsiblity to investigate and resolve complaints. Therefore, this factor was not addressed in our review.

SUNSET FACTOR: THE EXTENT TO WHICH THE ATTORNEY GENERAL OR ANY OTHER APPLICABLE AGENCY OF STATE GOVERNMENT HAS THE AUTHORITY TO PROSECUTE ACTIONS UNDER ENABLING LEGISLATION

Enabling legislation does not specifically define prosecutable offenses or authorize the Attorney General or other State agency to prosecute actions relating to FP&C. However, contract violations may be prosecuted by the Attorney General.

SUNSET FACTOR: THE EXTENT TO WHICH THE SECTION HAS ADDRESSED DEFICIENCIES IN THE ENABLING STATUTES WHICH PREVENT IT FROM FULFILLING ITS STATUTORY MANDATE

In 1980 FP&C supported the introduction of House Bill 2094. Proposed statutory changes included

- Requiring construction projects costing more than $500,000 to hold an appropriate city or county building permit, and
- Requiring a construction manager to be hired for construction projects costing in excess of $1,000,000 to oversee "...construction progress, ensure that all contractors follow applicable design standards and develop extensive work progress records."

The Legislature did not approve House Bill 2094. FP&C supports legislation to be introduced in the 1982 session which contains similar provisions for obtaining building permits.

SUNSET FACTOR: THE EXTENT TO WHICH CHANGES ARE NECESSARY IN THE LAWS OF THE SECTION TO ADEQUATELY COMPLY WITH THE FACTORS LISTED IN THIS SUBSECTION

Our review revealed that statutory changes are needed for FP&C to comply more adequately with the factors listed in this subsection:

- A.R.S. §41-726, subsection A, and §41-728 should be amended to 1) clarify FP&C's responsibilities, and 2) specifically define all exemptions from FP&C's powers and duties. (page 21)
- A.R.S. §41-726, subsection A, should be amended to provide FP&C with authority to 1) disapprove proposed leases, 2) cancel unsatisfactory leases, 3) eliminate leased facility inspections, and 4) require agencies to submit information concerning leased facilities to FP&C. (pages 21 and 29)

FINDING I

STATUTORY CHANGES ARE NEEDED TO PROVIDE FP&C WITH THE ABILITY TO REVIEW STATE LEASES OF REAL PROPERTY EFFECTIVELY.

A.R.S. section 41-726, subsection A, requires FP&C to review proposed projects, including leases, and to submit a report to the Legislature. According to the FP&C manager, one of the primary purposes of this requirement is to provide information on the number of State employees occupying leased space and the square footage leased. We found, however, that the number of State employees in leased space and the amount of space leased is unknown. As a result there is no single authoritative source from which the Legislature, or others, can obtain lease information. Additionally, there is no independent review, including FP&C's, to ensure that agencies are not incurring excessive or unnecessary rent expense.

Specifically, we found that

1. The number of State employees occupying leased space, the square footage of leased space and the amount of lease expense incurred by State agencies are unknown.

2. Data on leased space is incomplete because many agencies are exempt from FP&C's review.

3. Some agencies do not comply with requirements to notify FP&C of proposed leases.

4. FP&C's present lease review process is essentially meaningless.

5. The State may be incurring excessive and unnecessary lease expense.

Number of Employees in Leased
Space, Square-Footage Of Leased Space
and the Amount of Lease Expense Are Unknown

FP&C attempts to monitor the number of State employees occupying leased space, the square footage of leased space and the amount of lease expense incurred by State agencies as a means to assess the need for constructing new State-owned facilities. FP&C's only sources of such information are proposed leases submitted by agencies for review and FP&C's annual inspections of leased property.* State agencies have not been required to provide FP&C with any listings of leased facilities, associated costs or the number of employees occupying leased facilities. Because not all agencies submit proposed leases to FP&C and FP&C does not inspect all leased facilities,* FP&C's compendium of State facility leasing is incomplete.

Additionally, State accounting records do not reflect accurately the amount of lease expense incurred by State agencies. Our review revealed that State accounting records in the DOA-General Accounting Office showed that $5,022,000 was spent on rent during fiscal year 1979-80 whereas FP&C's 1979-80 annual report to the Legislature showed only $4,261,000 or $761,000 less. It should be noted, however, that rent expense is inconsistently reported in the DOA-General Accounting Office records because some leases include utilities, parking and various janitorial and maintenance services in rent expense while others do not. As a result, it is not possible to determine exactly how much state agencies are paying in rent.

* See page 23 for a review of deficiencies in FP&C's lease site inspections process.

Not All Leases Are
Subject to FP&C Review

A.R.S. §41-726, subsection A, requires FP&C to review proposed projects, including leases:

> "A. The facilities planning and construction section shall have the following powers and duties:
>
> . . . . . .
>
> "2. Review all proposed projects and improvements of state agencies and submit a report thereon to the legislature."

A project is defined for purposes of this statute in A.R.S. §41-725 as follows:

> "...the acquisition by purchase or lease of real property...." (Emphasis added)

A.R.S. §41-728 provides exemptions for the Board of Regents, the legislative and judicial branches, highway-related projects of the Department of Transportation and projects whose total cost does not exceed $5,000.

Further, three FP&C interpretations of its governing statutes have resulted in the exclusion of agencies which 1) have nonlease rentals* of $5,000 per month or less, 2) do not receive general fund appropriations, or 3) have facilities which are wholly or partially federally funded.

* Nonlease rentals are month-to-month rentals.

Although the FP&C manager has stated that FP&C is not responsible for reviewing nonlease rentals, such review is within the scope of FP&C's duties. According to a Legislative Council memorandum dated December 29, 1981,* nonlease rentals are not exempt from review:

> "The correct interpretation of these statutes, therefore, appears to be that the FP&C section must review and report on all leases of real property by state agencies unless the total cost of the lease 1) is stated or known as a sum certain and 2) is five thousand dollars or less. The intent is to exempt those leases that are known to have a relatively minimal impact on the state budget. If there is a possibility that the lease may exceed five thousand dollars, the legislature requires a report. Thus, virtually no month to month rental is exempt from review since by definition its term, and therefore the total cost, is indefinite.
>
> . . . . . .
>
> "Since the 'total cost' of a month to month rental is uncertain, it is impossible to state categorically that it 'will not exceed five thousand dollars'. Consequently, such rentals should not be categorically exempt from review by the FP&C section."

Further, the statutes do not clearly define FP&C's responsibilities for such agencies and facilities. According to a Legislative Council memorandum dated December 23, 1981,** FP&C's governing statutes are ambiguous:

> "Since certain programs, projects and improvements and state agencies are specifically exempted in A.R.S. section 41-728 from the FP&C section's powers and duties...all other state programs, projects and improvements and state agencies should be subject to those powers and duties.
>
> . . . . . .

* Appendix I contains the memorandum text.
** Appendix II contains the memorandum text.

"A great deal of confusion arises when applying this statute, even though specific exemptions are listed...because it is not clear exactly which buildings are state buildings and which projects and improvements are projects and improvements of state agencies for the purposes of A.R.S. section 41-726, subsection A. It is not clear whether buildings built with federal funds and used by state agencies are state buildings and whether federally financed projects and improvements are projects and improvements of state agencies under the statute and fall under the FP&C section's authority....

"A.R.S. section 41-726, subsection A, is even more ambiguous because it states '(t)he facilities planning and construction section shall have the following powers and duties....' (Emphasis added.) It is unclear which of the items listed in A.R.S. section 41-726, subsection A are duties and which are powers of the FP&C section. The distinction is important because duties are mandatory and powers are permissive." (Emphasis added)

Agencies Do Not Comply with Required Procedures

In lieu of statutory requirements, the State accounting manual briefly outlines procedures agencies should follow in submitting proposed leases for encumbrance.* The manual states that lease agreements must be approved by both the Office of the Attorney General and FP&C and that failure to obtain such approval will result in the return of the lease document to the agency. It should be noted that encumberances against such leases may not be paid.

However, there is widespread noncompliance with the State accounting manual. A review by audit staff of a sample of 20 leases for which FP&C claims it has responsibility for review revealed that 55 percent were already signed, executed and in effect at the time of FP&C review.

* An encumbrance is an obligation in the form of a purchase order, contract or other authorized fund source and for which a part of such fund source is reserved. It ceases to be an incumbrance when paid or canceled.

There appears to be three causes for agency noncompliance with current lease-review procedures. First, FP&C lacks statutory authority to compel agencies to submit lease proposals for review or to discipline those agencies that do not. Second, agencies are unaware of the required review procedure. An Auditor General survey of eleven State agencies revealed that four of the agency representatives involved in executing leases were not aware of the lease review procedures in the State accounting manual. Finally, it appears that the DOA-General Accounting Office is not checking for FP&C approval on lease agreements or returning those agreements that do not have approval.

FP&C Reviews Are
Essentially Meaningless

FP&C does not review lease agreements for reasonableness and economy. Instead, FP&C's review is limited to checking for the inclusion of an escape clause in the proposed agreement. According to a Legislative Council memorandum dated September 29, 1981,* FP&C has the power to perform more comprehensive reviews. The memorandum states in part:

> "...review of the benefits to the state of the property proposed to be leased, the reasonableness of the payments for the property proposed to be leased and other questions related to how the property proposed to be leased fits within the overall state facilities acquisition and construction plans definitely falls within the FP&C section's review authority."

Additionally, FP&C's review is a duplication of the more comprehensive review performed by the Office of the Attorney General. The Office of the Attorney General reviews leases for inclusion of all necessary provisions, including an escape clause as mandated by A.R.S. §38-511.

The FP&C manager stated that reviews for economy are unproductive because numerous leases are submitted after the effective date and FP&C lacks authority to take corrective action if unsatisfactory terms are discovered.

* Appendix III contains the memorandum text.

According to the same Legislative Council memorandum, FP&C cannot approve or disapprove leases which it reviews:

> "...A.R.S. section 41-726, subsection A, paragraph 2 does not authorize the FP&C section to approve proposed state agency facilities leases. Paragraph 2 only provides that the FP&C section shall, among other things, review all state agency projects (a term which includes leases) and submit a report thereon to the Legislature....
>
> . . . . . .
>
> "While the administrative authority of the FP&C section to review state agency leases...appears to be unquestionable, it is less clear whether the section would have the authority to deny a state agency the right to lease space...More over...there is no express or implied statutory reference to what happens should a state agency proceed to lease real property after the FP&C section has declined to give its approval...."

FP&C's lease review procedures are perfunctory when compared to those of the U.S. General Services Administration (GSA). The GSA reviews for location requirements, compliance with local safety codes, amount of space per employee and reasonableness of cost.

The State May Be Incurring Excessive and Unnecessary Lease Expense

FP&C's limited review and inability to disapprove uneconomical leases have resulted in inadequate control over lease expenditures by State agencies. The appropriations process similarly serves a limited control function. Agencies' spendings are limited by the amount appropriated to each expenditure classification. However, agencies are not required to allocate specific dollar amounts to subclassifications within the appropriation classification. Funds for lease expenditures are appropriated within the classification of "other operating expenditures," which also includes utilities, maintenance and repairs. Therefore agencies' expenditures for leased facilities are not generally constrained by the appropriations process.

During fiscal year 1979-80, State expenditures for leased facility space totaled at least $4.2 million* and ranged from less than $2 per square foot to almost $14 per square foot. Table 3 compares agencies' leases for facility space during fiscal year 1979-80.

* Recorded in FP&C's annual report to the Legislature. State accounting records reflected approximately $5 million for lease of privately owned facilities.

TABLE 3*

COMPARISON OF FISCAL YEAR 1979-80
LEASES BY STATE AGENCIES BY COST PER SQUARE FOOT OF SPACE

Cost per Square Foot	Agency	Number of Leases	Square Footage	Annual Cost
12 - 13.99	Department of Transportation - Highway Safety	1	2,773	$ 37,858
	Private, Technical and Business Schools	1	216	3,000
	Registrar of Contractors	1	143	1,980
10 - 11.99	Department of Economic Security	3	12,971	134,110
	Department of Public Safety	1	800	8,574
	Department of Revenue	1	29,157	318,124
8 - 9.99	State Compensation Fund	1	1,152	9,585
	Department of Corrections	3	2,944	25,482
	Department of Economic Security	5	7,255	62,578
	Office of Tourism	1	2,500	20,800
	Board of Osteopathic Examiners in Medicine and Surgery	1	336	2,970
	Department of Public Safety	1	1,414	11,783
	Registrar of Contractors	2	416	3,631
	Department of Health Services	1	1,800	14,400
	Fruit and Vegetable Standardization	1	365	3,057
6 - 7.99	Arizona Outdoor Recreation Coordinating Commission	1	2,560	16,848
	Attorney General	1	9,375	69,946
	Central Arizona Water Conservation District	1	1,146	9,034
	State Compensation Fund	5	4,749	29,876
	Department of Corrections	4	3,763	24,532
	Department of Economic Security	31	130,962	927,512
	Industrial Commission of Arizona	1	1,000	7,680
	Justice Planning Agency	1	4,425	32,221
	Department of Law	1	942	7,062
	Library, Archives and Public Records	1	6,137	37,800
	Board of Medical Examiners	1	2,521	16,386
	Board of Pardons and Paroles	1	2,522	17,652
	Department of Public Safety	4	8,571	63,192
	Radiation Regulatory Agency	1	7,212	54,451
	Supreme Court	1	2,438	17,064
	Department of Water Resources	1	15,010	102,798
	Department of Health Services	2	600	4,480
	Real Estate Department	1	1,348	9,975
	Department of Transportation	1	2,974	19,331
	DOA-Weights and Measures Division	1	500	3,358
	Registrar of Contractors	2	335	2,285
	Land Department	1	1,435	11,008
4 - 5.99	Radiation Regulatory Agency	1	3,946	19,443
	State Compensation Fund	2	2,074	11,166
	Department of Corrections	6	4,316	23,537
	Department of Economic Security	36	127,409	652,273
	Department of Education	1	9,400	46,724
	Fruit and Vegetable Standardization	2	2,202	11,635
	Library, Archives and Public Records	1	8,500	39,950
	Department of Public Safety	1	2,000	9,540
	Structural Pest Control Board	1	820	4,200
	Department of Transportation	2	2,155	12,408
	DOA-Weights and Measures	1	5,919	28,068
	Commission of Agriculture and Horticulture	2	450	2,160
	Department of Revenue	1	312	1,701
	Department of Health Services	1	1,000	5,954
	DOA-Risk Management	1	500	2,250
2 - 3.99	Commission on the Arts and Humanities	1	2,004	10,044
	Department of Corrections	6	13,207	37,140
	Department of Economic Security	31	130,358	359,675
	Department of Education	1	1,568	5,488
	Department of Health Services	2	9,542	26,268
	Department of Transportation	2	1,850	6,144
	Property Valuation	1	450	1,560
	Department of Revenue	1	450	1,560
	Registrar of Contractors	1	612	1,980
.01 - 1.99	Corporation Commission	1	19,205	23,449
	Department of Corrections	2	7,775	5,760
	Department of Economic Security	12	81,762	117,391
	Department of Public Safety	1	1,510	2,300
	Department of Health Services	1	400	240
	DOA-Public Buildings Maintenance	1	6,300	3,600
		211	722,763	$3,616,031 **

* Table 3 intended to show range of prices paid per square foot. True cost/square foot rental expenses are not reflected due to inclusion or absence of utilities, parking, janitorial or secretarial service.

** Table 3 was prepared from FP&C's lease inventory listing. The difference of $645,071 between total lease expenditures shown on Annual Report and total on table resulted from mathematical errors on the Report and unavailability of cost per square foot for some items on the inventory listing. In addition, some leases shown on the report are not listed on the inventory.

Unlike other Western states and several local entities, Arizona does not have a centralized lease-approval or negotiation function.

An Auditor General survey of 18 western states, the cities of Phoenix and Tucson and 7 firms in the State revealed that a majority require an independent third-party approval as part of established leasing procedures. Additionally, 70 percent have a centralized entity that either selects lease sites for, or lends assistance to, the leasing agency.

The procedures used by New Mexico illustrate how a centralized lease-approval system works and the cost savings that it can generate.

New Mexico established a property control division (PCD) with statutory authority to "control the lease or rental of space in private buildings" by state agencies. PCD in New Mexico has recently established procedures which include involvement in locating and negotiating for leased space for state agencies. These procedures will be enforced through PCD statutory authority to approve lease agreements. Centralization will allow New Mexico to obtain substantial cost savings and eliminate a perfunctory review of leases after their execution which existed prior to legislative change.

PCD was created in New Mexico with the expectation that savings to the state would occur by combining space needed by several agencies into consolidated negotiations and lease agreements. According to the PCD,

> "Utility costs may be consolidated (and) cost per square foot...is often reduced when the State is able to rent large quantities of space in a single building."

New Mexico's PCD has three employees and a computerized data bank of available lease sites. PCD costs approximately $60,000 a year to operate and is expected to generate $200,000 a year in cost savings from centralization of the lease negotiation function.

It appears that substantial cost savings could be realized by consolidating the lease negotiation functions which are presently performed by each State agency. Further study is needed to determine the economic impact of centralizing this function.

It should be noted that FP&C staff may lack sufficient resources to provide for adequate lease reviews. FP&C presently has eight staff members: the FP&C manager, an engineer, an engineer/architect, four inspectors and an administrative secretary. It would appear that only the manager has the necessary expertise to examine leases for reasonableness and economy.

CONCLUSION

The number of State employees occupying leased space, the square footage of leased space and the amount of lease expense incurred by State agencies are unknown. Although FP&C is required to review proposed leases of real property, it lacks authority to review all leases executed by State agencies or to approve or disapprove such leases. As a result, 1) FP&C's review of proposed leases is essentially meaningless, 2) information used in assessing the need for new State construction is inadequate, and 3) State lease expenditures may be excessive and unnecessary.

RECOMMENDATIONS

Consideration should be given to the following recommendations:

1. The Legislature amend A.R.S. §§41-726, subsection A, and 41-728 to a) clarify FP&C's responsibilities and b) specifically define all exemptions from FP&C's powers and duties.

2. The Legislature amend A.R.S. §41-726, subsection A, to provide that
   - exempt agencies submit to FP&C lists of leased facilities and amounts of the annual lease payments;
   - nonexempt agencies submit proposed leases to FP&C prior to execution;
   - FP&C be given authority to disapprove proposed leases for nonexempt agencies; and
   - FP&C be given authority to cancel leases of nonexempt agencies it has not approved if it determines the lease is not in the best interests of the State.

3. If granted the statutory authority described in Recommendation 2, FP&C develop and implement guidelines for lease review and approval, including reviews for reasonableness and economy.

4. A study be made of the feasibility of and cost savings from consolidating and centralizing the lease negotiation function.

FINDING II

FP&C'S INSPECTION OF LEASED FACILITIES SHOULD BE DISCONTINUED.

Facilities Planning and Construction (FP&C) conducts annual site inspections of property leased by the State for the primary purpose of monitoring the number of State employees occupying privately owned facilities to identify the need to construct additional State buildings. According to the FP&C manager, lease site inspections are also performed to

- verify that the State receives the square footage specified in the lease agreement;
- determine that the facility is occupied for a valid public purpose; and
- identify hazards.

Our review revealed that FP&C inspections of leased facilities do not fulfill their intended purpose and should be discontinued because

- All leased facilities are not subject to inspection by FP&C;
- Many of the inspections that FP&C does perform are either incomplete or inadequately documented;
- Few changes result when a deficiency is identified by an FP&C inspector; and
- FP&C's inspections duplicate, at least partially, inspections performed by other entities.

Additionally, FP&C's staff resources devoted to leased facility inspections should be reallocated to inspections of new construction projects because 1) any information obtained by FP&C during leased facility inspections can be obtained more efficiently directly from the agencies leasing the facilities, and 2) new construction project inspections are a higher FP&C priority. Finally, FP&C's statutory responsibility regarding lease inspections should be clarified.

All Leased Facilities Are Not Subject to Inspections

Although FP&C attempts to inspect each facility leased by a state agency at least once each fiscal year, we found that 1) numerous leased and rented properties are exempt from FP&C's jurisdiction,* and 2) FP&C did not inspect some nonexempt properties.

FP&C becomes aware of the existence of leased facilities when agencies submit proposed leases to FP&C for review.** However, some agencies are exempt from having to submit proposed leases to FP&C for review. As a result, FP&C not only does not inspect these leased facilities but may not know of the existence of the leased facilities as well. Additionally, when exempt agencies do submit leases to FP&C for review an inspection does not always ensue. Our review of a sample of 21 leases submitted by exempt agencies to FP&C revealed that 29 percent were not subsequently inspected by FP&C.

Further, it cannot be determined if FP&C inspects all facilities leased by nonexempt agencies. Our review of a sample of 19 leases in FP&C's files revealed that there is no evidence that FP&C conducted 26 percent of the inspections it should have during fiscal years 1978-79 through 1980-81.

The FP&C staff member responsible for supervising leased facility inspections was unable to determine if the required inspections had been conducted. The supervisor stated that the inspections may have been performed but the inspection reports discarded although FP&C inspectors are required to file inspection reports. He also stated that the inspections may not have been performed if FP&C received lease agreements for facilities in nonmetropolitan areas after inspections had been completed in those areas.

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* Arizona statutes provide exemptions for some agencies and for leases of less than $5,000. Further, FP&C's interpretation of its statutory responsibility has resulted in additional exemptions. See page 13 for a review of these exemptions.

** See page 11 for a review of deficiencies in FP&C's lease review process.

Inspections Are Not Adequately Documented and May Be Incomplete

Those inspections that FP&C does perform are often either incomplete or inadequately documented. Our review of 48 inspection reports filed by FP&C inspectors during the period July 1, 1979, and December 31, 1981, revealed that 30 percent were so incomplete that audit staff was unable to determine if the inspections had been performed as required.

In addition, many FP&C inspection reports do not adequately describe identified deficiencies. Audit staff reviewed 48 FP&C inspection reports and noted that 71 percent of the deficiencies identified did not adequately describe the nature of the violation. For example, one report described the condition of the premises as "badly deteriorated" but failed to specify those areas requiring improvement.

Finally, FP&C does not report to the Legislature on the condition, maintenance or utilization of leased facilities. According to the FP&C manager, the primary purpose of FP&C inspections is to gather data to assess the need for new State construction. However, 30 percent of the FP&C reports reviewed by audit staff did not indicate the number of State employees occupying the leased facility which is one of the primary factors involved in assessing construction needs.

Inspections Are Ineffective In Eliminating Deficient Conditions

Although most FP&C inspection reports identify deficiencies in leased facilities, FP&C lacks authority to compel the landlord to take corrective action. According to the Assistant Attorney General assigned to FP&C, FP&C cannot require 1) owners of private facilities to make needed improvements, or 2) lessee agencies to cancel leases if deficiencies are not remedied.

FP&C's follow-up is limited to merely notifying the agency of any deficiencies. However, FP&C does not send agencies copies of inspection reports. Further, audit staff was unable to determine if FP&C followed up on any of the 75 deficiencies identified in the 48 inspection reports it reviewed.

Because FP&C lacks the authority to remedy deficiencies and agencies may not be informed of identified deficiencies, few improvements in the condition of leased facilities are made. Our review of the available documentation for 30 leased facilities revealed that 60 percent of the identified deficiencies were not corrected and that new deficiencies were identified upon reinspection in 27 percent of the facilities.

FP&C Inspections May Duplicate Inspections by Other Entities

FP&C's inspections do not appear to provide for the health and safety of State employees in privately owned facilities. Other entities such as the State Fire Marshall, local fire departments and the Arizona division of the Federal Occupational Safety and Health Administration (OSHA) conduct inspections which appear to duplicate, at least in part, FP&C inspections.

The Phoenix City Fire Code Enforcement and Inspections section performs annual inspections of some buildings. These inspections include reviews for fire safety, fire code compliance and availability of handicap facilities. Penalties for noncompliance with applicable codes are included in the criminal code, and building owners may request inspections at no cost.

OSHA inspects privately owned facilities upon request. These inspections identify health and safety hazards based upon standard code specifications.

Better Use Can Be Made Of Staff Resources

Use of FP&C staff to perform inspections which are ineffective in obtaining corrective action and duplicate inspections performed by other entities represent a misallocation of resources.

The one inspector assigned to perform inspections outside of the metropolitan Phoenix area must perform mandated inspections of existing State-owned buildings and new construction projects in addition to lease-site inspections. According to the FP&C manager, priority is given to new construction inspections. However, our review revealed that out-of-town new construction projects are not inspected as frequently as local projects due to staffing limitations. It appears that the elimination of lease-site inspections would provide for more frequent inspections of new construction projects.

Further, data used to assess the need for new State facilities, such as the square footage of and the number of employees in leased space, could be obtained without FP&C inspections. If Arizona statutes were amended to require all agencies, both exempt and nonexempt, to annually furnish FP&C with information on the square footage of leased space and the number of employees occupying such space FP&C would no longer need to inspect leased facilities.

Statutory Responsibility
Should Be Clarified

A.R.S. §41-726, subsection A, requires FP&C to inspect State buildings:

> "The facilities planning and construction section shall have the following powers and duties:
>
> "1. Make an annual inspection of all state buildings and report to the legislature on the condition, maintenance and utilization of such buildings."

According to a Legislative Council memorandum dated June 11, 1981,* the inspections mandated by State law include leased facilities:

* Appendix IV contains the memorandum text.

> "'Regular' inspection is mandated by statute during the process of constructing a building leased by the state in order to ensure compliance with approved building plans and specifications. After construction has been completed, the FP&C section is required by statute to inspect all state buildings (a classification which includes leased structures) annually for the purpose of preparing a report to the Legislature on the condition, maintenance and utilization of such buildings." (Emphasis added)

However, the Assistant Attorney General assigned to FP&C believes that the statutory provision applies only to State-owned facilities, not leased space.

Because FP&C lease-site inspections do not appear to be an efficient or effective use of FP&C staff, the Legislature should clarify FP&C's inspection responsibilities to specifically exclude leased space.

CONCLUSION

FP&C's lease-site inspections are unnecessary in that they do not 1) protect the interests of the State by identifying health and safety hazards in all leased facilities, 2) ensure that deficiencies will be corrected when identified, or 3) provide sufficient inputs into the State construction needs assessment process. In addition, FP&C inspections appear to duplicate, at least in part, inspections performed by other agencies. As a result, FP&C inspections of leased facilities constitute an inefficient and ineffective use of FP&C staff.

RECOMMENDATIONS

Consideration should be given to the following recommendations:

1. The Legislature amend A.R.S. §41-726, subsection A, paragraph 1 to 1) specifically exclude leased facilities, and 2) require all agencies to submit annually to FP&C a listing of all leased facilities, the square footage and the number of employees occupying those facilities.

2. FP&C discontinue inspections of leased facilities and reallocate its staff to performing inspections of new building construction.

3. If FP&C is granted authority to approve leases as recommended in Finding I, the assistant director for finance should promulgate rules and regulations requiring agencies to submit inspection reports from local fire departments or the State Fire Marshall and/or OSHA with the proposed lease prior to execution. (See page 11)

OTHER PERTINENT INFORMATION

During the course of the audit the following conditions were observed and are reported here for the information of the Legislature.

Facilities Planning and Construction Has, in Reality, a Limited Role in Facilities Planning

The name, "Facilities Planning and Construction," may be a misnomer in that FP&C has no statutory responsibility for capital investment planning. Arizona statutes require only that FP&C act as a repository for plans prepared by State agencies. A.R.S. section 41-726, subsection A, paragraph 7 requires FP&C to

> "Maintain an updated plan at least five years in advance of all improvements and projects which will be required by state agencies." (Emphasis added)

Responsibility for developing such plans rests with the assistant director for finance, under the provisions of A.R.S. section 41-722, subsection B:

> "The assistant director for finance shall:
>
> . . . . . .
>
> "4. Develop and maintain, in cooperation with each state agency and recommend to the governor a comprehensive, long-range plan for capital outlay, consistent with means available for financing the same." (Emphasis added)

The planning process consists of 1) development of plans and 2) preparation of land, building and improvement (LB&I) requests by the Executive Budget Office (EBO). FP&C provides relatively little input into either process. Those agencies submitting the largest LB&I requests seldom seek assistance from FP&C. Additionally, FP&C's involvement with EBO is limited to providing information on the condition of existing buildings, the number of leases received for review and cost estimates for proposed projects.

FP&C's primary role in the planning process involves the Capitol Mall Complex. However, because FP&C has no in-house planning staff, the Capitol Mall Complex plans were developed by consultants. As a result FP&C's role in the Capitol Mall Complex plan is limited to updating and evaluating the plan annually to determine the need to construct new State buildings. This need is based on 1) the total number of State employees, 2) the number of State employees in leased space, and 3) annual lease expenditures. It should be noted that information concerning leased facilities is obtained through FP&C's lease review and inspection processes and that this data is incomplete as discussed on pages 12 and 23.*

Means Used to Finance New Construction May Be Inadequate

According to the Arizona Constitution, Article 9, Section 5, unsecured debt of the State cannot exceed $350,000:

> "The State may contract debts to supply the casual deficits or failures in revenues, or to meet expenses not otherwise provided for; but the aggregate amount of such debts, direct and contingent, whether contracted by virtue of one or more laws, or at different periods of time, shall never exceed the sum of three hundred and fifty thousand dollars...." (Emphasis added)

As a result of this relatively low general obligation debt limit, the State is effectively precluded from financing construction through debt financing. State construction must be from current-year appropriations, including the Capital Outlay Stabilization Fund, and available Federal funds.

* Incomplete information may adversely affect the ability of the EBO and Legislature to evaluate accurately LB&I requests.

LB&I appropriations from the general fund are residual amounts after appropriations for operating expenses have been made and are dependent upon projected revenues. Thus when revenues decline due to general economic conditions, LB&I appropriations experience a proportional decrease. Unavailability of LB&I monies may necessitate freezes on current construction or postponement of proposed projects, resulting in higher costs when construction is resumed.

Agencies which are housed in State-owned facilities pay rent assessments based on the square footage of the occupied space. These rent monies are deposited in the Capital Outlay Stabilization Fund for maintenance of existing buildings and construction of new facilities. Table 4 summarizes actual and estimated sources and disposition of the Capital Outlay Stabilization Fund for fiscal years 1976-77 through 1981-82.

TABLE 4

SUMMARY OF ACTUAL AND ESTIMATED SOURCES
AND DISPOSITION OF CAPITAL OUTLAY STABILIZATION FUND
FROM FISCAL YEAR 1976-77 THROUGH 1981-82

	Actual 1976-77	Actual 1977-78	Actual 1978-79	Actual 1979-80	Estimated 1980-81	Estimated 1981-82
SOURCES						
Beginning balance (deficit)	$5,242,756	$ 7,428,914	$4,387,500	$ (350,600)*	$ 195,400	$ 355,400
Building rent income	2,971,858	3,218,108	2,800,900	3,146,000	3,260,000	4,400,000
	$8,214,614	$10,647,022	$7,188,400	$2,795,400	$3,455,400	$4,755,400
DISPOSITION						
Actual appropriation:						
Repair and maintenance projects	$ 476,700	$ 70,574	$ 779,300			
Capitol Complex development		6,188,926	6,950,000	$2,600,000	$3,100,000	
Solar energy demonstration project	309,000					
Recommended appropriation:						
Capitol Complex development						$1,932,000
Repair and maintenance projects						1,197,000
Ending balance (deficit)	7,428,914	4,387,522	(540,900)	195,400	355,400	1,626,400
	$8,214,614	$10,647,022	$7,188,400	$2,795,400	$3,455,400	$4,755,400

* Difference between 1978-79 ending balance and 1979-80 beginning balance resulted from 13th-month transfers of funds from agencies to the Capital Outlay Stabilization Fund.

The loss of potential construction financing to payment of rent for privately owned space is particularly significant in view of the constitutional provision which prevents long-term debt financing of State buildings. Monies expended on privately owned leased facilities represent a lost opportunity cost in that if such money were instead placed in the Capital Outlay Stabilization fund it could be used to finance the construction of new State-owned facilities.

In the absence of available State facilities, agencies have been forced to lease quarters throughout the State. The increasing amounts expended for privately owned facilities indicate that planning and financing have been inadequate to provide for agencies' space needs. In the ten-year period between fiscal years 1968-69 and 1978-79, State expenditures for leased space have increased more than 155 percent even when rent expense is adjusted for inflation.

AREAS FOR FURTHER INQUIRY

During the course of our audit we identified a number of audit issues which we could not pursue because of staffing and time constraints and the unavailability of qualified consulting expertise.

These additional issues are

1. The adequacy of FP&C's new construction inspections;

2. The need for and adequacy of FP&C's reviews of plans and specifications; and

3. The need for FP&C's review of construction contracts.

DEPARTMENT OF ADMINISTRATION
FINANCE DIVISION

STATE OF ARIZONA

THE CAPITOL
PHOENIX, ARIZONA 85007

BRUCE BABBITT, GOVERNOR
ROBERT B. TANGUY, DIRECTOR
DONALD L. OLSON, ASSISTANT DIRECTOR

January 19, 1982

Mr. Douglas R. Norton, Auditor General
111 West Monroe, Suite 600
Phoenix, AZ 85003

Dear Mr. Norton:

We have had an opportunity to review the Perfomance Audit of the Department of Administration, Finance Division, Facilities Planning & Construction Section. This audit thoroughly identifies an area in which we realize improvements are needed. The two findings identified in the report are as follows:

FINDING I: STATUTORY CHANGES ARE NEEDED TO PROVIDE FP&C WITH THE ABILITY TO REVIEW STATE LEASES OF REAL PROPERTY EFFECTIVELY.

We concur with the recommendation to clarify the statutory responsibilities and more thoroughly define this function by amending ARS 41-726. We also agree with the suggestion that a study be made of the feasibility and cost savings to be realized by consolidating the lease negotiation function. We recognize the need for consolidation but we are not fully convinced that this function should be located with the Facilities Planning & Construction Section; however, it should be within the framework of the Department of Administration.

FINDING II: FP&C'S INSPECTION OF LEASED FACILITIES SHOULD BE DISCONTINUED.

At this writing we have implemented the recommendation contained in the Auditor General's report to discontinue the inspections of leased facilities.

Sincerely,

Donald L. Olson
Assistant Director for Finance

Robert B. Tanguy
Director

GCL:bp

APPENDIX I

LEGISLATIVE COUNCIL MEMORANDUM O-81-94

DECEMBER 29, 1981

ARIZONA LEGISLATIVE COUNCIL

MEMO

December 29, 1981

TO: Douglas R. Norton
Auditor General

FROM: Arizona Legislative Council

RE: Request for Research and Statutory Interpretation (O-81-94)

This is in response to a request submitted on your behalf by Gerald A. Silva in a memo dated December 17, 1981. No input was received from the Attorney General concerning this request.

FACT SITUATION:

Arizona Revised Statutes (A.R.S.) section 41-726, subsection A, paragraph 2 requires the Department of Administration, Finance Division, Facilities Planning and Construction (FP&C) Section to review "all proposed projects and improvements of state agencies. . .", which includes leased property according to the definition of "project" provided in A.R.S. section 41-725.

A.R.S. section 41-728, paragraph 1 provides an exemption from FP&C's powers and duties for the following projects:

> Programs, projects, or improvements by any state agency if the total cost of the entire proposed improvement or project will not exceed five thousand dollars.

QUESTION PRESENTED:

Are month to month rentals of real property whose monthly payments are less than $5,000, but for which total annual cost exceeds $5,000, exempt from review?

ANSWER: No.

The interpretation of the three statutes involved in this question can be facilitated by reading them together in two steps:

1. Substitute the definition for the term ("project") and combine the general duty with the exception. The FP&C section is to:

> Review all proposed /. . . acquisition(s) by. . . lease of real property/. . . of state agencies and submit a report thereon to the legislature /except/. . . /acquisition(s) by. . . lease of real property/. . . by any state agency if the total cost of the entire proposed. . . /acquisition by. . . lease of real property/ will not exceed five thousand dollars.

2. Remove the excess verbiage and place in standard grammatical arrangement. It is thus the duty of the FP&C to:

> Review all proposed lease acquisitions by state agencies and report thereon to the legislature unless the total cost will not exceed five thousand dollars.

The question presented involves the application of the five thousand dollar exemption.

It should be noted initially that an annual or monthly cost of a lease is irrelevant. None of the statutes involved in this question refer to an annual cost or any other limitation relative to time. Instead, the criterion is the "total cost" of the lease. Moreover, the words "will not exceed" state a legislative requirement of a definite knowledge of the total cost of the lease.

The correct interpretation of these statutes, therefore, appears to be that the FP&C section must review and report on all leases of real property by state agencies unless the total cost of the lease 1) is stated or known as a sum certain and 2) is five thousand dollars or less. The intent is to exempt those leases that are known to have a relatively minimal impact on the state budget. If there is a possibility that the lease may exceed five thousand dollars, the legislature requires a report. Thus, virtually no month to month rental is exempt from review since by definition its term, and therefore the total cost, is indefinite.

This interpretation is reinforced by the standard rules of statutory construction. The only element of this interpretation that may be questioned (because it is not explicitly stated in the statutes) is the requirement that the total cost of the lease be known as a sum certain. However, to disregard that element would expand the exemption to projects where the total cost "might not exceed" five thousand dollars. This would not only abrogate the specific statutory language "will not exceed", but would violate the judicial rule against enlarging or adding to an express exception. Wray v. Superior Court, 82 Ariz. 79 (1957). Exceptions to general statutory provisions are strictly construed. United States v. Bodine Produce Co., 206 F. Supp. 201 (D.C. Ariz. 1962).

CONCLUSION:

Since the "total cost" of a month to month rental is uncertain, it is impossible to state categorically that it "will not exceed five thousand dollars". Consequently, such rentals should not be categorically exempt from review by the FP&C section.

COMMENT:

You may consider recommending legislation to specifically address the question presented involving month to month leases.

cc: Gerald A. Silva
Performance Audit Manager

APPENDIX II

LEGISLATIVE COUNCIL MEMORANDUM O-81-93

DECEMBER 23, 1981

ARIZONA LEGISLATIVE COUNCIL

MEMO

December 23, 1981

TO: Douglas R. Norton
Auditor General

FROM: Arizona Legislative Council

RE: Request for Research and Statutory Interpretation (0-81-93)

This is in response to a request on your behalf by Gerald A. Silva in a memo dated November 30, 1981. No input was received from the Attorney General concerning this request.

FACT SITUATION:

Arizona Revised Statutes (A.R.S.) section 41-726, subsection A prescribes the powers and duties of the Department of Administration (DOA), Finance Division, Facilities Planning and Construction section (FP&C):

> A. The facilities planning and construction section shall have the following powers and duties:
> 1. Make an annual inspection of all state buildings and report to the legislature on the condition, maintenance and utilization of such buildings.
> 2. Review all proposed projects and improvements of state agencies and submit a report thereon to the legislature.
> 3. Review all architectural, engineering and construction contracts prior to submission to the department of law.
> 4. Approve plans and specifications and changes thereof for all projects and improvements for which funds are appropriated by the legislature.
> 5. Review and approve all progress payments on all major projects and improvements.
> 6. Make regular inspections of all projects and improvements during the course of construction to insure compliance with the plans and specifications approved by the assistant director.
> 7. Maintain an updated plan at least five years in advance of all improvements and projects which will be required by state agencies.

Legislative Council memorandums 0-81-19, 0-81-32 and 0-81-54 stated that FP&C is responsible for the duties specified in A.R.S. section 41-726, subsection A, paragraphs 1, 2, 5 and 6 for <u>all</u> buildings, projects and progress payments.

The FP&C manager has stated that the following exemptions apply to all the provisions of A.R.S. section 41-726, subsection A and that FP&C cannot exercise its powers over the following:

1. The Arizona board of regents, the judicial branch, the legislative branch and highway-related construction of the Department of Transportation are statutorily exempted by A.R.S. section 41-728.

2. Agencies which do not receive general fund appropriations, such as the Compensation Fund, the Industrial Commission, Industries for the Blind and Arizona Power Authority.

3. Agencies whose projects, both construction and leases, involve Federal funds, such as: a) Department of Economic Security buildings funded by the U.S. Department of Labor, b) certain National Guard and Air National Guard projects, c) Department of Corrections, Justice Planning Agency and Drug Strike Force (Arizona Criminal Intelligence System Agency) projects funded by the U.S. Law Enforcement Assistance Administration and d) Game and Fish projects.

QUESTION PRESENTED:

Do the three types of exemptions stated above apply to all seven statutory responsibilities of FP&C?

ANSWER:

A.R.S. section 41-728 provides that:

> There shall be exempt from the provisions of this article relating to planning:
>
> 1. Programs, projects or improvements by any state agency if the total cost of the entire proposed improvement or project will not exceed five thousand dollars.
>
> 2. The Arizona board of regents, except that the board of regents shall inform the division of finance of its financial requirements of state funds for programs, projects and improvements required for the ensuing fiscal year or years.
>
> 3. Programs, projects or improvements of the state highway commission relating to the construction, reconstruction, improvement or maintenance of state highways or bridges.
>
> 4. The legislative and judicial branches of state government, except as prescribed by law. (Emphasis added.)

The powers and duties of the facilities planning and construction section prescribed in section 41-726, subsection A, paragraphs 1 through 7 do not apply to any state agency programs, projects or improvements costing five thousand dollars or less, the Arizona Board of Regents, state highway commission (state transportation board) programs, projects or improvements relating to the construction, reconstruction, improvement or maintenance of state highways or bridges or the legislative or judicial branches because they are exempt under A.R.S. section 41-728.

/A/ cardinal rule of statutory construction is that where the legislature has acted to except certain categories from the operation of a

> particular law, it is to be presumed that the legislature in its exceptions intended to go only as far as it did, and that additional exceptions are not warranted. In other words, where there be express exceptions to a statute, additional exceptions by implication are not favored. In re Monks Club, Inc., 64 Wash. 2d 845, 394 P.2d 804 (1964), and Knapczyk v. Ribicoff, 201 F. Supp. 283 (N.D. Ill. 1962). See also 2A Sands, Statutes and Statutory Construction, section 47.11 (4th ed. 1973), where it is stated that when there is an express exception to a statute, no other exceptions will be implied. Colorado Public Interest Research Group, Inc. v. Train, 507 F.2d 743, 747 (1974).

"An enumeration of exceptions from the operation of a statute indicates that it should apply to all cases not specifically enumerated." Sutherland, Statutes and Statutory Construction section 47.11 (4th ed., Sands, 1973)). Since certain programs, projects and improvements and state agencies are specifically exempted in A.R.S. section 41-728 from the FP&C section's powers and duties set forth in A.R.S. section 41-726, subsection A, all other state programs, projects and improvements and state agencies should be subject to those powers and duties.

There are, however, limitations on which projects and improvements come under certain powers and duties of the FP&C section under A.R.S. section 41-726, subsection A.

A.R.S. section 41-726, subsection A, paragraph 4 applies to projects and improvements for which funds are appropriated by the Legislature. If the Legislature does not appropriate funds for a project or improvement, the FP&C section does not have the authority or duty to approve the plans and specifications or changes in the plans and specifications of the project or improvement. The FP&C section does not have to approve the plans and specifications of projects or improvements of state agencies which do not receive general fund appropriations. The other paragraphs in A.R.S. section 41-726, subsection A should apply whether or not a state agency receives general fund appropriations.

It should also be pointed out that A.R.S. section 41-726, subsection A, paragraph 5 only applies to major projects and improvements. The FP&C section should only review and approve progress payments on major projects or improvements. See Arizona Legislative Council Memorandum (0-81-72) for discussion of the term "major".

A great deal of confusion arises when applying this statute, even though specific exemptions are listed in A.R.S. section 41-728, because it is not clear exactly which buildings are state buildings and which projects and improvements are projects and improvements of state agencies for the purposes of A.R.S. section 41-726, subsection A. It is not clear whether buildings built with federal funds and used by state agencies are state buildings and whether federally financed projects and improvements are projects and improvements of state agencies under the statute and fall under the FP&C section's authority. It seems that buildings used by state agencies and projects and improvements of state agencies should be considered state buildings and projects and improvements of state agencies, but some ambiguity does exist if they are federally funded.

A.R.S. section 41-726, subsection A is even more ambiguous because it states "/t/he facilities planning and construction section shall have the following powers and

duties. . . . ." (Emphasis added.) It is unclear which of the items listed in A.R.S. section 41-726, subsection A are duties and which are powers of the FP&C section. The distinction is important because duties are mandatory and powers are permissive.

CONCLUSION:

The state agencies and programs, projects and improvements listed in A.R.S. section 41-728 are clearly exempt from all the powers and duties of the FP&C section set forth in A.R.S. section 41-276, subsection A. Projects and improvements for which the Legislature has not appropriated funds are not subject to A.R.S. section 41-726, subsection A, paragraph 4, but this limitation in paragraph 4 does not necessarily prohibit application of the other paragraphs in A.R.S. section 41-726, subsection A to such projects and improvements. It is not clear whether the FP&C section's powers and duties cover buildings built with federal funds and federally financed projects and improvements.

RECOMMENDATION:

Since it is unclear if the powers and duties of the FP&C section under A.R.S section 41-726, subsection A cover buildings built with federal funds and federally financed projects and improvements, and since it is unclear which of the functions listed under A.R.S. section 41-726, subsection A are duties and which are powers, your office may wish to recommend corrective legislation to the Legislature.

cc: Gerald A. Silva
Performance Audit Manager

APPENDIX III

LEGISLATIVE COUNCIL MEMORANDUM O-81-19

SEPTEMBER 29, 1981

ARIZONA LEGISLATIVE COUNCIL

MEMO

September 29, 1981

TO: Douglas R. Norton, Auditor General

FROM: Richard R. Greenfield, Deputy Director

RE: Request for Research and Statutory Interpretation (O-81-19)

This is in response to a request submitted on your behalf by Gerald A. Silva in a memo dated September 25, 1981. No input was received from the Attorney General concerning this request.

FACT SITUATION:

Arizona Revised Statutes (A.R.S.) section 41-726 requires the Facilities Planning and Construction Section (FP&C) of the Department of Administration to, among other things:

> Review all proposed projects and improvements of state agencies and submit a report thereon to the legislature.

As defined by A.R.S. section 41-725, paragraph 3:

> "Project" means the acquisition by purchase or lease of real property or the construction of new buildings, or both.

QUESTIONS PRESENTED:

1. In reviewing a lease made by a State agency with a private concern what provisions in the lease agreement does FP&C have the authority to review (i.e., legality, location, lease payments, etc.)?

2. Does FP&C have the authority in A.R.S. section 41-726 to deny a State agency the right to lease space as proposed by that agency based on the disapproval of a lease provision discussed in question 1?

3. Is the month to month rental of real property included in the definition of "project" prescribed by A.R.S. section 41-725?

ANSWERS:

1. The Department of Administration, Facilities Planning and Construction Section (FP&C) has the authority to review, under the referenced statute, all aspects of state agency leasing procedures which it deems appropriate in the exercise of its statutory responsibilities as the state's primary facilities planning and construction supervision office. The section must follow, however, a "rule of reason" and review only those lease provisions with which it can reasonably be expected to have expertise. Review of the legality of specific lease provisions would, for example, be beyond the presumed expertise of FP&C section staff.

2. Probably not. There is no specific statutory authority under A.R.S. section 41-726 for the FP&C section to deny a state agency the right to lease space as proposed by that agency based on the FP&C section's disapproval of certain lease provisions. A.R.S. section 41-726, subsection A, paragraph 2 merely provides that the FP&C section "review" all proposed projects. Paragraph 4 of this subsection provides that the FP&C section approve "plans and specifications and changes thereof for all projects". Authorization to the FP&C section to approve plans and specifications for projects is different from authorization to the section to review, approve or deny the projects themselves.

3. Yes. A month to month rental of real property is a periodic tenancy and is in the nature of a tenancy at will, one of the four major types of leasehold interests which can be created under common law. A leasehold estate is, among other things, an estate in realty held under a lease. Since a lease is defined as within the term "project" under A.R.S. section 41-725, paragraph 3, a month to month rental may be similarly defined within the referenced statute. Moreover, since the major purpose of A.R.S. section 41-726, subsection A, paragraph 2 is to allow FP&C to review the space uses of state agencies and report to the Legislature, it would require a substantial diversion from apparent legislative intent to allow an agency to enter a month to month rental arrangement and thus avoid review by the FP&C.

DISCUSSION:

Administrative agencies are creatures of legislation without inherent or common law powers. The general rule applied to statutes granting powers to administrative agencies is that they have only those powers that are conferred either expressly or by necessary implication. Sutherland, Statutory Construction, section 65.02 (4th ed., Sands, 1972); Corporation Commission v. Consolidated Stage Company, 63 Ariz. 257, 161 P.2d 110 (1945); Garvey v. Trew, 64 Ariz. 342, 170 P.2d 845 (1946). The FP&C section must follow the provisions of the Arizona Revised Statutes in exercising its administrative powers and duties relating to the review of all proposed projects and improvements of state agencies, as well as with respect to every other matter.

1. In that the statutes do not prescribe the specific review procedures to be followed by the FP&C section, reference must be made to the meaning of the operative terms in the enabling statutes. It is an elementary principle of statutory construction that each word in a statute will be given effect. Sutherland, section 46.06; State v. Superior Court In and For Maricopa County, 113 Ariz. 248, 550 P.2d 626 (1976). The words of a statute are to be given their common meaning unless it appears from the context or otherwise that a different meaning is intended. Ross v. Industrial Commission, 112 Ariz. 253, 540, P.2d 1234 (1975).

According to Black's Law Dictionary 5th Ed. 1979), the word "review" means:

> To reexamine judicially or administratively. A reconsideration; second view or examination; revision: consideration for purposes of correction.

The term "review" has various meanings, dependent on its use in any given statute. Vinyard v. Vinyard, 4 Terry 422, 48 A.2d 497, 499 (1946). Use of the term review in an administrative setting implies powers more limited than in a judicial context, where the authority to review can mean the same thing as the authority to revise. State v. Griffiths, 137 Wash. 448, 242 P. 969 (1946).

Black's Law Dictionary (5th Ed. 1979), defines the word "lease" as, in part:

> Any agreement which gives rise to relationship of landlord and tenant (real property) or lessor and lessee (real or personal property). . . . Contract for exclusive possession of lands for determinate period . . . . Conveyance, grant or devise of realty for designated period with reversion to grantor. Conveyance of interest in real property for specified period or at will . . . .

A.R.S. section 41-726, subsection A, paragraph 2 provides that the FP&C section review all proposed projects of state agencies and submit a report thereon to the Legislature. A.R.S. section 41-725, paragraph 3 defines "project" as the acquisition by purchase or lease of real property or the construction of new buildings, or both. While review of the legislative history of these two sections provides no specific guidance as to legislative intent, it seems clear that the two sections, read together, require the FP&C section to review all proposed state agency leases for the acquisition of real property or the construction of new buidings. There is nothing in applicable state statutes or available case law to suggest that the lease review authority of the FP&C section is limited other than by a "rule of reason" to those subjects within the section's statutory charge as the overall state facilities planning and construction supervision agency. If the Legislature had intended the lease review authority of the FP&C section to be limited in the planning and construction supervision areas, it must be assumed that the Legislature would have so provided. Thus, the FP&C section has the authority to review all aspects of state agency leasing arrangements which it deems necessary in the exercise of its statutory responsibilities under A.R.S. section 41-726, subsection A, paragraph 2.

The FP&C section should not be expected, however, to exercise review responsibilities outside of its institutional mission. The section has no legal staff. Thus, it should not be expected, nor should it undertake on its own initiative, to study the legality of specific provisions in a proposed state agency real property lease. On the other hand, review of the benefits to the state of the property proposed to be leased, the reasonableness of the payments for the property proposed to be leased and other questions related to how the property proposed to be leased fits within overall state facilities acquisition and construction plans definitely falls within the FP&C section's review authority.

2. First of all, A.R.S. section 41-726, subsection A, paragraph 2 does not authorize the FP&C section to approve proposed state agency facilities leases. Paragraph 2 only provides that the FP&C section shall, among other things, review all state agency projects (a term which includes leases) and submit a report thereon to the Legislature. Had the Legislature intended in this paragraph to give the FP&C section authority to deny a state agency lease, it

would have so provided. The process of review in an administrative setting, as noted above, does not necessarily include the right to approve or deny.

Paragraph 4 of A.R.S. section 41-726, subsection A is closer to the grant of enabling authority presumed in question number 2. Paragraph 4 provides that the FP&C section:

> Approve plans and specifications and changes thereof for all projects and improvements for which funds are appropriated by the legislature.

Again, review of the available legislative history for this section fails to suggest precise legislative intent with respect to the word "approve". According to Black's Law Dictionary (5th Ed. 1979), the word "approve" means:

> To be satisfied with; to confirm, notify, sanction or consent to some act or thing done by another. To sanction officially; to notify; to conform . . . .

In substance, A.R.S. section 41-726, subsection A, paragraph 4 provides, for the purpose of this memorandum, that the FP&C section approve plans and specifications for all state agency projects (including leases) for which monies are appropriated by the Legislature. Note that the statute provides that the FP&C section approve project plans and specifications. The phrasing relating to project plans and specifications rather than the projects themselves may be explained in part by the fact that the clear emphasis in the statutes relating to the FP&C section is on state facilities construction. It is difficult to construe a statutory grant of authority to approve project plans and specifications as including the authority to approve or deny a lease on the basis of specific lease provisions.

While the administrative authority of the FP&C section to review state agency leases under A.R.S. section 41-726, subsection A, paragraph 2, with respect to conformance with overall state facilities planning and construction objectives, appears to be unquestionable, it is less clear whether the section would have the authority to deny a state agency the right to lease space in the given fact situation. An administrative agency has only such powers as are conferred either expressly or by necessary implication. The problem is with the two operative statutory provisions. One refers to the review of all state agency projects for the purpose of preparing a report for the Legislature and the other refers to the approval of plans and specifications of all projects and not to approval or denial of the projects themselves. There is no reference to any authority for the FP&C section to deny a lease on grounds of disapproval of specific lease provisions. Moreover, even assuming that existing law can be construed to fit the given fact situation, there is no express or implied statutory reference to what happens should a state agency proceed to lease real property after the FP&C section has declined to give its approval to plans and specifications relating to the lease in question.

3. Under A.R.S. section 41-725, paragraph 3, "project" is defined as "the acquisition by purchase or lease of real property or the construction of new buildings, or both." A month to month rental of real property is a periodic

tenancy and is in the nature of a tenancy at will, one of the four major leasehold types of estates which can be created under common law. A leasehold estate is merely an estate in realty held under a lease. Defining a month to month rental as a tenancy at will, and, as such, a form of lease, means that it is included under A.R.S. section 41-725, which defines "project" to include lease.

In that the major purpose of A.R.S. section 41-726, subsection A, paragraph 2 is to allow FP&C to review the space uses of state agencies and report to the Legislature, it would require a substantial diversion from apparent legislative intent to allow an agency to enter a month to month rental arrangement and thus avoid review by the FP&C. Moreover, to allow an agency to enter a month to month rental arrangement and thus avoid review might well prove to be more expensive to the state and preclude long-range facilities planning.

RECOMMENDATIONS:

The statutes relating to review and approval of state agency leases by the Department of Administration, Facilities Planning and Construction Section are unclear in several respects. If it is deemed appropriate that the section execute this review function according to specific criteria and procedures and that it have the authority to reject leases which do not meet this criteria, appropriate corrective legislation should be recommended to the Legislature.

cc: Gerald A. Silva
Performance Audit Manager

ARIZONA LEGISLATIVE COUNCIL

MEMO

June 11, 1981

TO: Douglas R. Norton
Auditor General

FROM: Arizona Legislative Council

RE: Request for Research and Statutory Interpretation (0-81-54)

This is in response to a request submitted on your behalf by Gerald A. Silva in a memo dated June 3, 1981 and received by this office on June 5, 1981. No input was received from the Attorney General concerning this request.

FACT SITUATION:

Arizona Revised Statutes (A.R.S.) section 41-726 provides for the Facilities Planning and Construction (FP&C) section of the Division of Finance of the Department of Administration (DOA) to:

1. Make an annual inspection of all state buildings and report to the legislature on the condition, maintenance and utilization of such buildings.

2. Review all proposed projects and improvements of state agencies and submit a report thereon to the legislature.

3. Review all architectural, engineering and construction contracts prior to submission to the department of law.

4. Approve plans and specifications and changes thereof for all projects and improvements for which funds are appropriated by the legislature.

5. Review and approve all progress payments on all major projects and improvements.

6. Make regular inspections of all projects and improvements during the course of construction to insure compliance with the plans and specifications approved by the assistant director.

7. Maintain an updated plan at least five years in advance of all improvements and projects which will be required by state agencies.

A.R.S. section 41-725 defines "project" as the acquisition by purchase or lease of real property or the construction of new buildings, or both.

QUESTIONS PRESENTED:

1. Do the statutes require the FP&C section to make an inspection of leased property?*

2. If so, is this inspection to take place annually, before the first lease term takes effect, sometime during the first lease term or for each renewal term?

ANSWERS:

1. In general, yes. Pursuant to A.R.S. sections 41-725 and 41-726, the FP&C section is required to inspect a leased building during the actual process of construction as well as after construction is completed. The purpose of each inspection is, however, different.

2. "Regular" inspection is mandated by statute during the process of constructing a building leased by the state in order to insure compliance with approved building plans and specifications. After construction has been completed, the FP&C section is required by statute to inspect all state buildings (a classification which includes leased structures) annually for the purpose of preparing a report to the Legislature on the condition, maintenance and utilization of such buildings.

DISCUSSION:

1. It is an elementary principle of statutory construction that each word in a statute will be given effect. Sutherland, Statutes and Statutory Construction section 46.06 (4th ed., Sands, 1972); State v. Superior Court In and For Maricopa County, 113 Ariz. 248, 550 P.2d 626. The words of a statute are to be given their common meaning unless it appears from the context or otherwise that a different meaning is intended. Ross v. Industrial Commission, 112 Ariz. 253, 540 P.2d 1234 (1975).

A.R.S. section 41-726, subsection A, paragraph 6 requires the FP&C section to:

> Make regular inspections of all projects and improvements during the course of construction to insure compliance with the plans and specifications approved by the assistant director /for finance of the department of administration/.

A.R.S. section 41-725, paragraph 1 defines "improvement" for the purpose of A.R.S. section 41-726, subsection A, paragraph 6, as "/t/he alteration, enlargement, rehabilitation or repair of existing state buildings."

A.R.S. section 41-725, paragraph 3 defines "project" for the purpose of A.R.S. section 41-726, subsection A, paragraph 6, as "/t/he acquisition by purchase or lease of real property or the construction of new buildings, or both."

Reading A.R.S. section 41-725, paragraph 3 and A.R.S. section 41-726, subsection A, paragraph 6 together, there is little doubt that the FP&C section is statutorily required

*Per our telephone conversation with Mary Lynn of your staff on June 11, 1981, we assume for the purposes of this memo that "leased property" includes leased buildings.

to make regular inspections of leased buildings during the actual process of construction. The purpose of these construction inspections is to determine compliance with approved construction plans and specifications. It is well to emphasize that A.R.S. section 41-726, subsection A, paragraph 6 requires inspections only during the actual process of building construction. For this paragraph to apply in the fact situation under consideration, the lease between the state and the future building owner would have to be in effect prior to the start of or during construction. The FP&C section would not be responsible under paragraph 6 for the construction inspection of a facility which is not leased by the state until after construction is completed.

Once construction is completed, A.R.S. section 41-726, subsection A, paragraph 1 requires inspections of "all state buildings" (a classification which includes leased structures) on an annual basis. The point and purpose of these inspections is the development of information for collection into a report to the Legislature on the condition, maintenance and utilization of all state buildings.

2. The timing of the inspection during the course of construction should be governed by the word "regular" in A.R.S. section 41-726, subsection A, paragraph 6. According to Black's Law Dictionary (5th ed., 1979), "regular" means:

> Steady or uniform in course, practice or occurrence; not subject to unexplained or irrational variation. Usual, customary and general. Gerald v. American Casualty Co. of Reading, Pa., D.C.N.C., 249 F. Supp. 355, 357 (1966).

Administrative agencies are creatures of legislation without inherent or common law powers. The general rule applied to statutes granting powers to administrative agencies is that they have only those powers as are conferred either expressly or by necessary implication. Sutherland, id., section 65.02; Corporation Commission v. Consolidated Stage Company, 63 Ariz. 257, 161 P.2d 110 (1945); Garvey v. Trew, 64 Ariz. 342, 170 P.2d 845 (1946). Under A.R.S. section 41-726, the function of the FP&C section is to serve as the general office planning and construction supervision office for the state. Necessary powers to effectuate this objective are implied. In order to properly respond to this statutory mandate, FP&C section inspection authority must include state-leased as well as state-owned facilities.

Accordingly, during the actual process of construction of a building under lease to the state and following from the above definition of "regular", inspection should be as often as necessary to insure compliance with the construction plans and specifications approved by the assistant director for finance. Thereafter, the inspection of state buildings which are leased should be on an annual basis pursuant to A.R.S. section 41-726, subsection A, paragraph 1. Paragraph 1 requires an annual inspection of "all state buildings" (a classification which includes leased structures) for the purpose of reporting to the Legislature on the condition, maintenance and utilization of all state buildings.

RECOMMENDATION:

If the FP&C section finds it difficult to comply with its present inspection responsibilities because of staff or funding problems, the appropriate committees of the Legislature should be apprised.

cc: Gerald A. Silva
Performance Audit Manager