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To: Hon. Chair and Members, Pima County Board of Supervisors

From: Andrew L. Flagg, Chief Civil Deputy County Attorney
Regina L. Nassen, Deputy County Attorney

Date: December 8, 2017

Subject: Board authority to ask voters to approve an excise tax for roads

At the November 21, 2017 Board meeting, the question arose whether the County has the statutory authority to ask County voters to approve an excise tax specifically for roads. We have researched the question and now conclude that the relevant statutes are hopelessly in conflict, meaning there is no clear statutory authority for the Board to do so.

We start with the premise that the Board may only levy taxes that are "authorized by law," meaning that express statutory authority is required. As has been discussed at recent meetings, the Board has clear statutory authority to authorize a general excise tax, without an election, by unanimous vote.[1] There is a separate statute that, on first read, appears to also allow any county, regardless of its population, to levy a transportation excise tax upon approval by a majority vote of qualified electors.[2]

[1]A.R.S. § 42-6103.

[2]The statute, A.R.S. § 42-6107, reads in its entirety as follows:

> A. If a majority of the qualified electors voting at a countywide special election, or a majority of the qualified electors voting on the ballot proposition at a general election, approves the transportation excise tax, the county shall levy and the department shall collect a tax:
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> 1. At a rate of not more than ten per cent of the transaction privilege tax rate as prescribed by section 42-5010, subsection A applying, as of January 1, 1990, to each person engaging or continuing in the county in a business taxed under chapter 5, article 1 of this title.
>
> 2. At a rate of not more than ten per cent of the rate prescribed by section 42-5352, subsection A.

The problem is that the statute requires the tax revenues to be deposited in a "regional area road fund" (and expended in accordance with statutory restrictions on that fund), but the statute that establishes the referenced fund only applies to counties with a population of 400,000 or less.[3] There is no authority for such a fund to be established for Pima County. So if Pima County voters were to approve a proposed excise tax under § 42-6107, there would be no provision governing where to deposit the proceeds of the tax or how they would be spent.

This conflict in the statutes applies only to Pima County (the only county with a population between 400,000 and 1,200,000 as of the 2010 decennial census), and the history of the statutes sheds some light on how this anomaly came to be. Before 1990, three statutory provisions governed transportation excise taxes—one applied to Maricopa County,[4] one to Pima County,[5] and one to the remaining counties.[6] Pima County never adopted the transportation excise tax, but if it had, the proceeds would have gone into the "regional area road fund." At that time, there was a statute that authorized such a fund to be established for Pima County.[7] When the Regional Transportation Authority (RTA) was created, the Legislature turned the Pima County transportation excise tax statute into the RTA-tax statute,[8] and repealed the statute that authorized Pima County to have a "regional area road fund."[9] This kept in place the basic scheme, but the transportation excise tax could only be levied by the RTA, not Pima County, and deposited into a new fund, the "regional transportation fund."

When the RTA statute was expanded to smaller counties, the statutes initially provided that, in addition to Pima County, counties between 200,000 and 400,000 in population could form an RTA. But the statute specifically said they could not have *both* the RTA tax and the transportation excise

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> 3. On the use or consumption of electricity or natural gas by retail electric or natural gas customers in the county who are subject to use tax under section 42-5155, at a rate equal to the transaction privilege tax rate under paragraph 1 applying to persons engaging or continuing in the county in the utilities transaction privilege tax classification. If a majority of the qualified electors in the county approved the transportation excise tax under this section before 1998, a tax under this paragraph may be approved by resolution adopted by a majority of the board of supervisors.
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> B. The net revenues collected under this section within a county shall be deposited in the county's regional area road fund pursuant to title 28, chapter 17, article 3.
>
> C. The tax shall be levied under this section beginning January 1 or July 1, whichever date occurs first after approval by the voters, and may be in effect for a period of not more than twenty years.

[3]A.R.S. § 28-6391(A) ("In a county *with a population of four hundred thousand persons or less*, the officer collecting transportation excise tax monies pursuant to section 42-6107 shall immediately transfer the monies to the state treasurer.") (emphasis added).

[4]At that time, it was codified as A.R.S. § 42-1482; it has since been revised and renumbered as A.R.S. § 42-6104.

[5]At that time, it was codified as A.R.S. § 42-1483.

[6]At that time, it was codified as A.R.S. § 42-1484; it has since been revised and renumbered as § 42-6107 (*see* n.4 above).

[7]At that time, it was codified as A.R.S. § 28-1594.02.

[8]1990 Ariz. Sess. Laws Ch. 380, § 6.

[9]1990 Ariz. Sess. Laws Ch. 380, § 2. This statute is now codified as A.R.S. § 42-6106.

tax.[10] In 2010, the Legislature changed this to allow those counties the option of having both an RTA tax and a transportation excise tax if the voters approved both.[11] In doing so, however, the Legislature created the conflict we have now. The limitation in the county transportation excise tax statute,[12] to counties with a population of 400,000 or less was eliminated, but the statute that provides for establishing a "regional area road fund,"[13] into which proceeds of that tax must be deposited, was not amended.[14] That statute still does not allow counties between 400,000 and 1,200,000 to have a regional area road fund. A review of the legislative history to the 2010 amendment shows the primary concern was providing an additional option to counties between 200,000 and 400,000—the impact on Pima County was not discussed.

Thus, we have a conflict that can't be resolved simply by trying to read the statutes "in harmony"—the transportation excise tax statute, by its terms, would allow Pima County voters to authorize the tax, but Pima County cannot have a "regional area road fund" and therefore lacks statutory authority to deposit and spend any funds collected. Under these circumstances, we think the better answer is that Pima County lacks statutory authority to ask voters to approve a transportation excise tax.

cc: C.H. Huckelberry, County Administrator

[10]2009 Ariz. Sess. Laws Ch. 52, §§ 4-5.

[11]2010 Ariz. Sess. Laws Ch. 326, §§ 1-2.

[12]§ 42-6107.

[13]§ 28-6391.

[14]*See generally* 2010 Ariz. Sess. Laws Ch. 326.