



## ATTORNEY/CLIENT PRIVILEGED M E M O R A N D U M

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To: Hon. Stephen W. Christy

From: Regina L. Nassen

Date: November 15, 2017 (correction made to fn. 24, 12/11/2017)

Subject: Legality of Transferring County Road Maintenance Program to RTA

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Supervisor Christy, Andy Flagg asked me to respond to your October 30, 2017, letter asking for advice regarding the legality of your proposed plan to transfer County sales-tax revenue to the RTA, to be used for road maintenance within the County.

In your memo, [\*Just Fix the Roads Plan\*](#), you describe the proposal as follows:

Third – we further propose that upon enactment of a countywide half-cent sales tax, that the Board of Supervisors authorize that all revenues generated by the sales tax be directed solely and singularly to the Regional Transportation Authority, and that the RTA has the complete and total direction over the administration of this tax revenue for the singular purpose of fixing our roads – and for fixing our roads only.

The memo states that, under this plan, the Board of Supervisors would merely “contribute to the development of the RTA’s Road Repair Program.” It also states that the sales tax would be scheduled to sunset after ten years. The November 7 Board of Supervisors meeting agenda describes the RTA’s expected involvement as “the development, administration, and execution of a countywide RTA Road Repair Program.”

Your letter noted that there is some uncertainty regarding the scope of the RTA’s authority. This memo addresses that issue, as well as the Board of Supervisors’ authority to delegate its road maintenance responsibilities, restrict use of the tax revenue, and sunset the tax.

### Summary.

Though the RTA’s authority isn’t entirely clear, there is a reasonable argument that it could—assuming it would be willing to do so—conduct road maintenance projects on County roads under an

intergovernmental agreement with the County, using money provided by the County. The more significant problem is the County's ability to delegate that responsibility as completely as your proposal has suggested. The County is responsible for maintenance of County roads, and that duty is non-delegable in a couple different senses. These conclusions are explained more fully below. This does not mean, however, that the RTA cannot play an important role in helping the County shape its roadway maintenance program.

### Authority of RTA

The RTA developed the 20-year "regional transportation plan" (the "Plan") that was approved by Pima County voters at the same time they approved the half-cent RTA road tax. At this point, the RTA's primary function is to maintain, annually update, and implement—using the revenue from the RTA tax as well as any other funds in the "regional transportation fund"<sup>1</sup> (the "Fund")—a "five year transportation improvement program" (the "Program") that is consistent with the voter-approved Plan.<sup>2</sup> The Program and Plan contain major capital, rather than maintenance or repair, projects.

The RTA has clear authority<sup>3</sup> to own and operate "public transportation systems and related transportation facilities and services."<sup>4</sup> "Public transportation" is defined, however, as "local transportation of passengers by means of a public conveyance, including para-transit."<sup>5</sup> In other words, the phrase includes transit systems such as bus and light rail; it does not include streets and roads. The RTA's authority to operate and maintain the latter is less clear.

Other than controlled-access highway projects, which must be constructed by ADOT,<sup>6</sup> the RTA can itself carry out roadway projects included in the Program/Plan, or can contract with local jurisdictions for the construction.<sup>7</sup> Once constructed, the local jurisdiction within which the improvement is located is "responsible for maintaining the project."<sup>8</sup> The RTA has no explicit authority to accept a contractual delegation of that maintenance responsibility. On the other hand, it also is not explicitly *prohibited* from doing that, and the statutes do allow monies in the construction account of the Fund to be used for "operation, maintenance ... of ... each element of the regional

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1 [§ 48-5307](#). The RTA controls the "regional transportation fund." It includes three separate accounts: the bond account, construction account, and bond proceeds account. [§ 48-5307\(F\)](#). Monies in the fund must be "used and spent only as provided in" the RTA statutes. [§ 48-5307\(E\)](#).

2 [§§ 48-5304\(3\)](#) and [48-5309](#).

3 Title 48, Chapter 30, of the Arizona Revised Statutes.

4 [§ 48-5304\(1\)](#), (9) and (12).

5 [§ 48-5301\(9\)](#).

6 [§ 48-5312\(A\)](#).

7 Compare [§ 48-5312\(B\)](#) ("authority *may* contract with" local jurisdictions (emphasis added)); [§ 48-5304\(3\)\(c\)](#) (improvement program must list, for each project, "the political subdivision with responsibility for project implementation"); [§ 48-5304\(12\)](#) (RTA "shall ... [h]ave sole authority to implement the elements of the regional transportation plan"); [§ 48-5304\(13\)](#) (RTA "shall ... [c]oordinate the implementation of the regional transportation plan among the local jurisdictions"). If the RTA wanted to carry out a road project on a County road, however, it would still need the County's consent.

8 [§ 48-5312\(C\)](#).

transportation plan.”<sup>9</sup> The current RTA Plan does not include road maintenance,<sup>10</sup> but the Plan could be amended to include maintenance, without voter-approval, if the County agrees to provide the funding, which is what your plan contemplates.<sup>11</sup> Though I would of course defer to the RTA counsel’s legal analysis on this issue,<sup>12</sup> in my opinion a court would more likely than not, if asked to decide the issue, conclude that the RTA has legal authority to include roadway–maintenance projects in the Plan and the Program, and carry out those projects on County roadways with the County’s permission and funding.

### Delegation of Road Maintenance Program

Even though, as noted, the RTA probably has authority to carry out County road maintenance projects, it would be problematic for the County to try to delegate its entire roadway-maintenance function to the RTA.

The County’s responsibility for County road maintenance is non-delegable in two different senses. First, the Board of Supervisors cannot lawfully abdicate its responsibility to make the legislative/policy decisions that its members were elected to make, which includes deciding how to allocate limited financial resources and prioritize road-maintenance and repair projects. Second, the County would remain legally liable for the condition of its roads, regardless of any attempted delegation of its maintenance responsibilities; at the same time, the delegation would deprive the County of important limitations on that liability.

### *Delegation of Legislative Authority*

A legislative body cannot delegate its discretionary authority to another entity, individual, or body.<sup>13</sup> Having been elected to make certain political decisions, the members of such a body cannot hand those decisions over to someone else to make. Delegation of administrative/executive authority is, of course, permitted,<sup>14</sup> and—particularly for a board of supervisors, which exercises both legislative and executive authority—it is not always clear which decisions are legislative and which are

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9 [§ 48-5308](#)(C).

10 According to Pima Association of Government’s website, “RTA funds can only be used in ways prescribed by the voter-approved RTA plan. Currently the 2006 voter-approved plan does not include any pavement preservation or routine maintenance projects.”

<http://www.pagregion.com/AboutPAG/FAQ/tabid/65/Default.aspx#What is RTA>

11 [§ 48-5309](#)(B). Monies provided by the County can be deposited in the construction account of the Fund can also contain monies provided to the RTA by the County. [§ 48-5307](#)(A)(2).

12 The RTA’s lawyer has been out of town, and has not yet had a chance to finish his analysis, or consult with his client.

13 Such authority can be delegated to subordinate legislative bodies—for example, the State can delegate authority over certain local matters to its political subdivisions—but the RTA is not a subordinate body of the County. *Skinner v. City of Phoenix*, 54 Ariz. 316, 321 (1939) (“we see no reason why [the Legislature] may not delegate this authority, upon such terms as they may think proper, to subordinate legislative bodies, such as boards of supervisors and common councils of municipalities already created.”)

14 “The powers of a county shall be exercised only by the board of supervisors or by agents and officers acting under its authority and authority of law.” [§ 11-201](#).

executive.<sup>15</sup> Budgeting and establishing spending priorities is, however, quintessentially legislative. To the extent that the proposed plan wholly delegates to the RTA—an independent body—the Board’s discretion to determine funding priorities for the County’s road-maintenance-and-repair program, with no specific limitations and standards, I think it goes too far.<sup>16</sup>

### *Liability Issues*

Counties owe the public a duty to keep county roads reasonably safe for travel.<sup>17</sup> For purposes of tort liability, this duty is non-delegable.<sup>18</sup> That means that the County remains liable for injuries caused by the condition of its roadways, even if it has put another entity in charge of making decisions about how to maintain them.

Statutes protect public entities, including the County, from liability under certain circumstances. One of those statutes provides that a public entity is not liable for acts or omissions that constitute the “exercise of a ... legislative function,” or the “exercise of an administrative function involving the determination of fundamental governmental policy.”<sup>19</sup> The exercise of a qualifying administrative function “involves the exercise of discretion,” including the “determination of whether to ... provide the resources necessary for ... maintenance of facilities.”<sup>20</sup> “Maintenance” is further defined as “the establishment or continuation in existence of facilities, highways, roads, streets, bridges or rights-of-way by a public entity and does not mean or refer to ordinary repair or upkeep.”<sup>21</sup> Under this statute, a public entity will not be liable for injuries caused by the condition of a roadway if the public entity’s failure to maintain the roadway is a result of applying reasonable criteria to prioritize projects in light of limited financial resources (though the entity will still have a duty to post warning signs if the condition is unreasonably dangerous, and must still provide ordinary upkeep).

In order to be entitled to the statute’s protection, however, the public entity must make an affirmative policy decision; a decision by “default” is not entitled to immunity.<sup>22</sup> So, for example, in one case, the Court of Appeals held that the City of Phoenix could not be held liable for failing to install a traffic signal at an intersection, because that failure resulted from the City’s discretionary decision to use a computer program to evaluate specific criteria and rank the need for such signals; having made the discretionary policy decision to use that system, for which the City would be entitled to immunity, the City could not be held liable for following it.<sup>23</sup> It is my understanding that the Pima

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15 “The line of demarcation between what is a legitimate granting of power for administrative regulation and an illegitimate delegation of legislative power is often quite dim.” [State v. Marana Plantations, Inc.](#), 75 Ariz. 111, 114 (1953) (holding unconstitutional a broad delegation of authority by legislature to the State Board of Health).

16 [Galati v. Lake Havasu City](#), 186 Ariz. 131, 134 (App. 1996) (“A decision to fund street construction or improvements is a legislative act.”).

17 [Dunham v. Pima County](#), 161 Ariz. 304, 306 (1989); [Martinez v. State](#), 177 Ariz. 270, 271 (App. 1993).

18 [Wiggs v. City of Phoenix](#), 198 Ariz. 367, 369–70, ¶ 8 (2000).

19 [§ 12-820.01\(A\)](#).

20 [§ 12-820.01\(B\)\(1\)](#).

21 [§ 12-820\(4\)](#).

22 [Galati v. Lake Havasu City](#), 186 Ariz. 131, 136 (App. 1996).

23 [Kohl v. City of Phoenix](#), 215 Ariz. 291, 296, ¶ 24 (2007) (“The omission of the Intersection from the final

County Department of Transportation currently takes a similarly systematic approach to prioritizing major maintenance and repair projects, based on specified criteria and standards; if it fails to get to a particular project because it is too far down the priority list, the County cannot be held liable for that failure. But if the County were to instead hand the prioritization of road projects to the RTA, an independent entity, without at least requiring application of specified standards and criteria, the County would lose that immunity.<sup>24</sup>

### *Scope of Delegation*

Though the County cannot *completely* wash its hands of its road maintenance program, and its allocation of funding for that program, it could still heavily involve the RTA in the planning process. If the RTA is willing to do so, it could author and annually update a proposed road-maintenance-and-repair program for the Board of Supervisors' review and approval, using guidelines and standards provided by the Board. It could obtain public input on the program, and monitor and report on the County's execution of the program and its use of the sales-tax revenue. If desirable, the RTA could even carry out specific projects using County funds, by entering into IGAs with the County, much as the County and RTA currently do, but in reverse. It is only the extremely broad scope of the delegation currently contemplated, without the exercise of any real discretion or oversight by the Board of Supervisors, that is problematic.

### Sun-Setting and Use of Tax Revenue

A board of supervisors also cannot limit its own future exercise of legislative discretion. Legislative enactments by a political body can always be revisited and revised by that same body.<sup>25</sup> Use of the general county sales tax is not limited by statute.<sup>26</sup> Therefore, although the current Board of Supervisors may want to require that the sales-tax revenue be used only for road purposes for the next ten years, it cannot do so directly. Once the tax is levied, and until it sunsets or is repealed, the Board can revise its anticipated use of those funds each time it goes through the budgeting and appropriation process.

That said, however, there may be a way to limit use of the tax revenue indirectly. In addition to the 10-year sunset provision that you suggested, the Board could, when it levies the tax, provide that the tax will sunset earlier if at any time the Board budgets or spends the tax revenue for purposes unrelated to roads. Assuming the authorizing statute hasn't been repealed or materially amended, the Board would still have the discretion to, at that time, levy a new sales tax and spend the resulting revenue for any purpose, but it would have to meet the statutory unanimity requirement. In other words, although the Board cannot limit its future exercise of legislative discretion, it can exercise its discretion now in a conditional manner to levy the tax in a conditional manner only.

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list of recommended signalization locations was an automatic product of the City's immune decision to use SIGWAR as an initial screening tool and was thus itself immune under § 12-820.01.”).

24 The RTA would, if it meets the criteria in the statute, be entitled to immunity. But the County would not, if it had not independently exercised the requisite discretion. And, since the duty to keep roads safe is non-delegable, it would not matter that the decision was made by the RTA.

25 [\*Bd. of Sup'rs of Apache County v. Udall\*](#), 38 Ariz. 497, 509 (1931) (a board of supervisors cannot contractually bind itself to maintain a road indefinitely, because a future board might chose to abandon it; the board cannot “contract away that right” and a contract that purports to do that is void).

26 [§ 42-6106\(C\)](#) (“The county shall use these revenues to support and enhance countywide services.”).

cc: Hon. Sharon Bronson, Chair  
Hon. Ramón Valadez  
Hon. Ally Miller  
Hon. Richard Elías  
C.H. Huckelberry, County Administrator