



MEMORANDUM

PIMA COUNTY ATTORNEY'S OFFICE | CIVIL DIVISION

32 N. Stone Ave., Suite 2100

Tucson, AZ 85701

(520) 724-5700 | Fax: (520) 620-6556

To: Supervisors Rex Scott and Adelita Grijalva
From: Samuel E. Brown, Chief Civil Deputy, PCAO
Acknowledgments: Niya Tawachi, PCAO Civil Law Clerk
Date: 3/1/2022

Subject: Gun Shows at the Pima County Fairgrounds: Current and Future Contracting

Questions Presented:

On December 18, 2021, you asked our office to provide an opinion regarding the following:

1. Can the Board of Supervisors direct the members of the Southwestern Fair Commission (SFC) to abrogate the contracts for the 2022 gun shows and prohibit the SFC from entering into future contracts?
2. If the Board of Supervisors is able to direct the SFC to take this action, what reasons can the Board of Supervisors cite that would not run afoul of Arizona statutes?
3. Can the SFC take independent action to abrogate its contracts with gun shows and refuse to enter into any future contracts of a similar nature?
4. If the SFC honors existing contracts with the gun show, can the SFC not book gun shows in the future?
5. Does the Board of Supervisors and or/ the SFC have any ability to abrogate the gun show contracts and refuse to enter into similar ones unaddressed by the previous inquiries?
6. Given that the cited statutes enacted by the Legislature prevent local governments from taking appropriate action to ensure public health and safety, including on its own property, what would be the County's prospects for success if it were to challenge State laws in any court action

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Analysis:

1. Can the Board of Supervisors direct the members of the SFC to abrogate the contracts for the 2022 gun shows and prohibit them from entering future contracts?

No, the Board of Supervisors (Board) does not have the authority to direct members of the SFC to abrogate the contracts for the 2022 gun shows or to prohibit the SFC from entering future contracts. The SFC is an independent, nonprofit organization, contractually permitted to enter into contracts with third parties for any purpose that is aligned with its Articles of Incorporation, its bylaws, and/or its operating agreement with Pima County.

The operating agreement grants the SFC “the status of an independent contractor,” delineates that the SFC “shall [not] be considered an employee of Pima County,” and grants the SFC “the exclusive right to use and occupy the Fairgrounds.” The contract further provides that the SFC is to “operate, manage, maintain and improve the Fairgrounds.” In doing so, the SFC is expressly “permitted to enter into agreements with third parties related to the operation of the Fair and Special Events, and for the management or use of portions, or facilities located on, the Fairgrounds.” Additionally, “[a]ll utilization of the Fairgrounds by third parties shall be scheduled and directed by and through the... [SFC].”

The SFC has entered into four contracts for gun shows in 2022. By their terms, those contracts “may be amended or added to...[through] an agreement in writing signed by the parties.” However, even if the SFC were not an independent entity, A.R.S. § 13-3108 (section 13-3108) may prevent the Board from directing the SFC regarding its gun show contracts. Our office has previously advised the Board that section 13-3108 prevents the Board from imposing contract terms on the SFC that would prohibit the use of fairgrounds for gun shows. Section 13-3108 imposes numerous restrictions on political subdivisions, acting in any capacity, including barring any ordinance or rule relating to the sale of firearms. Any ordinance or rule that violates the statute is unenforceable and can result in significant liability including a civil penalty up to \$50,000 and actual damages up to \$100,000. A directive by the Board relating to the abrogation of gun show contracts, and the prohibition against the creation of future contracts, may violate section 13-3108 as effectively regulating the sale of firearms by a political subdivision and thus result in liability.

Other Considerations

While the Board may not be able to direct the SFC regarding its contracting with gun shows, the Board may have some authority over the SFC actions regarding other matters. The contract between the County and the SFC provides the County with authority in the following areas:

- Fees (Section 4.4): The SFC may charge fees for Special Events and the use of the Fairgrounds, however, the fee amounts require County approval.
- Assignment, Concessions, and Subcontractors (Section 5): The SFC is not permitted to “assign or transfer [its Agreement with the County] or any interest therein, or allow any other person...to occupy the Fairgrounds...without first obtaining the written consent of [the] County.” Advance written consent from the County is also required for third party

agreements with the SFC that last more than three years (including any extensions or renewals.) The SFC is also required to respond to the County's request for "copies of any of its agreements with third parties that relate to the Fairgrounds or [the SFC's] operations thereon."

- Fairgrounds Revenues (Section 6): The SFC's level of compensation is subject to the "County's reasonable judgment."
- Alterations (Section 7): The County's written consent is needed for "any improvements, alterations, additions, or changes to the Fairgrounds...involving an expenditure of more than...\$100,000." Additionally, the SFC is required to "notify the County prior to beginning any Alteration on the Fairgrounds that will cost in excess of \$10,000." For those alterations "that cost more than the applicable Maximum Expenditure Amount...[the] County shall have the right to object to the plans and specifications."
- Prohibited Activities (Section 13): The SFC must secure the County's written consent in order to "conduct any activity or permit any activity to be conducted on the Fairgrounds which is not covered by the insurance policies provided pursuant to Section 18" of the contract. In addition to the County's written consent, the SFC is required to provide "additional insurance [to cover] the activity or event...with coverage limits and carriers acceptable to [the] County." The SFC is expressly prohibited from doing or permitting anything that "will in any way increase the existing rate of or affect any fire or other insurance upon the Fairgrounds."
- Insurance (Section 18): While the SFC "may require that [commercial general liability] insurance be carried by those users of the Fairgrounds who actually carry out the activities being insured...[the SFC] shall be liable to the County for any failure by such third party to furnish the required insurance." The County is expressly provided the authority to "increase the limits on coverage for unique or high risk Special Events." Additionally, the "County retains the right to reasonably increase the limits or types of coverage...as determined in the best interest of [the] County by the Pima County Risk Manager."
- Environmental Compliance (Section 19): The SFC cannot "cause or permit any Hazardous Material...to be brought upon, kept, or used in or about the Fairgrounds...without the prior written consent of the County."

2. If the Board of Supervisors is able to direct the SFC to take action, what reasons can we cite that would not run afoul of Arizona statutes?

In light of the analysis provided above, it is unlikely that the Board is able to direct the SFC to take action without violating section 13-3108 or the Board's contractual obligations to the SFC.

3. If we honor the contracts already in existence, can the SFC not book gun shows in the future?

The SFC, as an independent entity, is likely able to decline contracting with gun shows in the

future. There are no provisions in either its contracts with the gun show or the County that would require the SFC to continue to enter future contracts with gun shows. In its Articles of Incorporation and its contract with the County, the SFC is charged with managing the Fairgrounds for the benefit of the public and in furtherance of the public's interests. In light of increasing gun violence, the SFC's decision not to contract with future gun shows may be a decision made for the benefit of the public, it may be a pure economical decision, or a decision made for other reasons that are aligned with its non-profit purposes.

However, although the SFC is an independent entity, such a decision may be characterized or viewed by a Court as the SFC acting as an agent of the County through its operating agreement.

The BOS might consider discontinuing the practice of its Fair Commission board members automatically becoming SFC board members. Then, the SFC would select its own board members who may or may not also serve on the Fair Commission board.

4. Could the SFC take independent action to abrogate these contracts and refuse to enter into any further contracts of a similar nature?

The SFC may be able to take independent action to abrogate its contracts with the gun show so long as that action is premised on the gun show's breach of contract. The contract between the SFC and the gun show stipulates that should either party breach the terms of the contract, "the breaching party agrees to pay reasonable attorney's fees, expenses and costs for legal enforcement of the provisions." Unlike the contract between the SFC and the County, the contract between the SFC and the gun show does not explicitly address what actions constitute a breach of agreement. However, the SFC may be able to abrogate its contract if it finds that the "contract signer, promoter and show staff . . . [have failed] to comply with all local, state and federal laws while conducting their event."

5. Does the Board of Supervisors and/or the SFC have any ability to abrogate these contracts and refuse to enter similar contracts unaddressed by the previous questions?

SFC

The Board of Supervisors may have limited authority regarding the SFC's ability to contract with third parties. The contract between the County and the SFC expressly provides that the SFC "be permitted to enter into agreements with third parties related to the operation of the Fair and Special Events, and for the management or use of portions of, or facilities located on, the Fairgrounds." The contract further provides that these agreements "include, without limitation, third party uses and operations for food and beverage operations, and other activities related to the Fair or" Special Events. Additionally, the SFC may "hire third parties to perform services such as maintenance, construction and landscaping on the Fairgrounds."

The SFC's ability to contract with third parties is only constrained by limited County oversight. For example, the SFC must obtain the County's advance written consent for agreements lasting longer than 3 years "(including any extensions or renewals)." Additionally, the SFC is prohibited from "delegat[ing] its overall responsibility for all operations on the Fairgrounds, without County's written consent, which may be withheld at the reasonable discretion of the County." The contract further provides that all agreements between the SFC and third parties "shall be

subordinate and subject to the terms of” the agreement between the County and the SFC. Additionally, the SFC is prohibited from entering “into any agreement with any entity or person with respect to the Fairgrounds or [the SFC’s] operations at the Fairgrounds that will result in a direct or indirect pecuniary benefit to any person who is, or within the five years preceding the transaction was, an officer, director, employee or representative of” the SFC.

Board

Another consideration that carries inherent risk but may be a viable option: pass a resolution (not an ordinance or rule) expressing the Board’s identification of the issue (increase in gun violence), statement of purpose (wishing to take no actions that may contribute to this identified crisis), and calling for help from the federal and state government (since Arizona law has stripped it of authority to pass rules or ordinances related to gun regulation). However, passing a resolution that induces the SFC to abrogate a contract could also potentially result in liability for interference with contractual relations.

6. Given that Arizona statutes prevent local governments from taking appropriate action to ensure public health and safety, including on local government property, what would be the county’s prospects for success if we challenged the laws in any court action, especially since we are the local public health authority under state law?

The prospects for success are not high, and may hinge on the County’s ability to: (1) challenge the constitutionality of A.R.S. §13-3108; (2) identify a procedural defect in the statute’s construction; or (3) secure an injunction against the State’s enforcement of A.R.S. § 13-3108 and its prohibition on a political subdivision’s regulation of firearms. Under A.R.S. § 12-1801, a judge may grant an injunction in three circumstances: (1) “When...the party applying for the writ is entitled to the relief demanded, and such relief...requires the restraint of some act prejudicial to the applicant;” (2) “When, pending litigation, it appears that a party is doing some act respecting the subject of litigation...in violation of the rights of the applicant, which tend to render the judgement ineffectual;” and (3) “In all other cases when applicant is entitled to an injunction under the principles of equity.”

When seeking a preliminary injunction, the seeking party “must show (1) a strong likelihood of success on the merits, (2) the possibility of irreparable harm if the relief is not granted, (3) the balance of hardships favors the party seeking injunctive relief, and (4) public policy favors granting the injunctive relief.” *Fann v. State*, 493 P.3d 246, 253 (2021) (citing *Smith v. Ariz. Citizens Clean Elections Comm’n*, 132 P.3d 1187, 1190 (2006)). When seeking a permanent injunction, the seeking party “must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law...are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *eBay v. MercExchange*, 547 U.S. 388, 391 (2006).

Even though the County has broad public health authority, this specific statute (section 13-3108) likely preempts County action and would control. Specific legislation controls over general legislation, “[i]t is fundamental that when two statutes deal with the same subject, the more specific statute controls...” *Pinal Vista Props., L.L.C. v. Turnbull*, 208 Ariz. 188, ¶ 23 (App. 2004).

The County would need to show that the statute is unconstitutional, and we have yet to identify a viable argument to challenge its constitutionality.

Conclusion:

The Board of Supervisors likely has little authority over the SFC's ability to contract with gun shows. Even if the Board of Supervisors were able to direct the SFC with regards to the gun shows, such action would likely violate Arizona law. While the Board of Supervisors is limited in its authority, the SFC may be able to take independent action. Without breaching the lease agreement, it may be difficult for the SFC to abrogate its current lease agreements with the gun shows.