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AN ARIZONA LAW FIRM

MEMORANDUM

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To: Supervisor Rex Scott

From: Thomas Benavidez

Re: RTA Audit and Voting Authority

Date: October 27, 2022

CC: Mr. Farhad Moghimi

ISSUES PRESENTED

1. Which entities have authority to conduct audits of the Regional Transportation Authority ["RTA"].
2. Whether members of the RTA Board of Directors may vote as proxies for their respective jurisdictions.

Background.

In analyzing these issues, it is critical to understand that the RTA is a municipal corporation and political subdivision of the State of Arizona, created by the Arizona legislature, and codified in the Arizona Revised Statutes ["A.R.S."] Title 48, Chapter 30. *See*, A.R.S. 48-5302 (B). As a creature of the legislature, the RTA has authority to exercise only those powers granted to it by the legislature. *See, Drexel Heights Fire Dist. v. City of Tucson*, 175 Ariz. 488 (App. 1993); *Northwest Fire District v. U.S. Home*, 215 Ariz. 492, 494 (2007).

The legislature has granted *sole* authority to the RTA Board to develop, adopt, implement, and administer the voter-approved Regional Transportation Plan. *See*, A.R.S. 48-5304 (6) (12) (13) & (16); 48-5309 (A); 48-5314 (A). The RTA has authority to operate in *all* areas of the County. A.R.S. 48-5302 (C).

1. Audit Authority.

To ensure that the RTA Board is meeting its fiduciary duty to spend RTA revenue consistent with state statutes [and bond covenants] governing the use of its revenues, the state legislature has authorized two entities to audit the RTA. The first authorized entity is the RTA Board. Pursuant to A.R.S. 48-5304 (8), the RTA Board is required to cause an annual audit of its financial transactions and records to be performed by a *certified public accountant*. This has been undertaken each year since implementation of the voter-approved transportation excise tax.

In addition to the RTA Board's annual audit, the legislature requires that the State Auditor General inform the legislature on the RTA's management of the voter-approved transportation tax by undertaking a periodic performance audit that:

a) Reviews past expenditures and future planned expenditures of the transportation excise revenues and determines the impact of the expenditures in solving transportation problems within the county and, for a transportation excise tax in effect in a county as provided in section 42-6107, determines whether the expenditures of the transportation excise revenues comply with section 28-6392, subsection B.

(b) Reviews projects completed to date and projects to be completed during the remaining years in which a transportation excise tax is in effect. *Within six months after each review period, the auditor general shall present a report to the speaker of the house of representatives and the president of the senate detailing findings and making recommendations.* A.R.S. 41-1279.03 (A)(6)(b) [emphasis added].

As required by the legislature, these performance audits have been undertaken in the tenth year and in the fifteenth year following implementation of the voter-approved transportation excise tax. A.R.S. 41-1279.03 (A)(6). The most recent performance audit was completed and published in April 2022, and can be found here: <https://www.azauditor.gov/reports-publications/counties/report/pima-association-governments-regional-transportation-authority>

Regarding this most recent audit, the Auditor General noted:

“The audit report also provides information on an approximate \$149 million funding gap needed to fulfill RTA plan promised projects that PAG, the RTA, and local jurisdictions are working to address; and performance results related to mobility, congestion, and safety; and includes recommendations for strengthening management of costs and funding and continuing to improve PAG's and RTA's performance measurement framework.”

Again, as a creation of the state legislature, the RTA's performance is closely monitored by the State Auditor General, who has an obligation to report its findings to both houses of the state legislature. Except for specific state and federal grant requirements, there are no other entities authorized to undertake a general financial or legal audit of the RTA.

2. Voting Authority of RTA Board Members.

The RTA is self-governing, under a board of directors system. The directors are the members of the Pima Association of Governments [“PAG”] Regional Council. A.R.S. 48-5303 (A). However, unlike PAG, which is a private, nonprofit corporation, the RTA is a political subdivision of the State of Arizona. A.R.S. 48-5302 (B). The members of the Board hold *public offices*. A.R.S. 38-101(1) [public office means any board of any political subdivision of the state]; *Tomaris v. State*, 71 Ariz. 147, 149 (1950) [public office must be created by legislature, have specific duties imposed by legislature, and must exercise some form of sovereign power].

As public officers, members of the RTA Board must take an oath of office swearing loyalty to the constitution and laws of the state in faithfully executing the duties of their office:

I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona, that I will bear true faith and allegiance to the same and defend them against all enemies, foreign and domestic, and that *I will faithfully and impartially discharge the duties of the office of RTA Board Member according to the best of my ability, so help me God (or so I do affirm)*. A.R.S. 38-231 (E) [emphasis added].

One of the most critical laws that must be followed in performing a public official’s duties is the open meeting law. The open meeting law was intended to allow members of the public to attend meetings so they can observe and hear their representatives deliberate and make decisions on matters of public concern. Decision-making in secret or outside of a properly noticed public meeting interferes with the public’s right to see and hear their representatives’ discussions and deliberations, and is strictly prohibited. A.R.S. 38-431.01 (A); 38-431.05 (A). Consequently, it is not consistent with the open meeting law for a member of the RTA Board to deliberate and make a decision on RTA business at a meeting other than a public meeting of the RTA Board.

In 2011, the PAG Regional Council amended its Bylaws to *eliminate* proxy voting. Proxy voting occurs when someone appears at a public meeting to deliver the pre-determined vote of another person or group of persons. Such voting methods deprive the constituents of PAG and RTA of the opportunity to observe their representatives deliberate on PAG/RTA business. Such a process is the antithesis of what the open meeting law requires.

Finally, the duties of RTA Board Members are enumerated in the RTA enabling statutes at A.R.S. 48-5304. Those are not the responsibilities of the respective jurisdictional members, rather those are duties imposed upon the individual board members, who have taken an oath to *faithfully and impartially discharge* those duties. Individual board members have absolutely no authority to delegate their duties to another person or group of persons. To do so would constitute nonfeasance in public office. A.R.S. 38-443.

CONCLUSION

Please let me know if you have any further questions concerning these issues.