



City of Peoria • 8401 West Monroe Street •
Peoria, Arizona 85345
OFFICE OF THE CITY ATTORNEY

CIVIL
PROSECUTOR

623-773-7330
623-773-7335

OPINION NO. 2005-01

TO: Meredith R. Flinn, Deputy City Manager, Development and
Community Services
FROM: Stephen M. Kemp, City Attorney
DATE: April 26, 2005
SUBJECT: Authority of the City of Peoria on County and Water Conservation
District Property.

QUESTIONS:

1. To what extent does the City of Peoria exercise authority over property located within a Maricopa County Regional Park.
2. To what extent does the City of Peoria exercise authority over property owned by the Maricopa Water Conservation District.

OPINION:

I. INTRODUCTION. This opinion addresses the interplay between two distinct political subdivisions of the state and the city. Understanding this interplay requires a discussion of the nature of each political subdivision.

Counties are political subdivisions of the state. A county has no original powers, rather all of its powers are conferred upon it by the State. Maricopa County v. Black, 19 Ariz. App. 239 (1973). These powers may be expressly granted or necessarily implied from a grant of power by the state.

Cities are municipal corporations. They may be a charter (home rule) city or a general law city with a grant of power from the state. Unlike counties, general law cities are granted implied powers that derive from those granted under state law, even if not expressly mentioned. A charter (home rule) city draws its authority and power from the Arizona Constitution and its charter that acts as its own organic law. Unlike a charter city, the county receives all of its power and authority through the statutes enacted by the state.

Irrigation and Water Conservation Districts are a special purpose taxing district created by an act of the State.^{1 2} The legislature has deemed them to be municipal corporations as it pertains to laws of this state affecting or relating to them. A.R.S. §48-2901. Even with this extensive grant of power by the state legislature, irrigation and water conservation districts remain political subdivisions of the state. Enloe v. Baker, 94 Ariz. 295, 301, 383 P.2d 748 (1963) As a political subdivision, it has no implied powers and its delegated powers are both a grant and limitation on the nature of the power conferred.

II. AUTHORITY OF THE CITY ON COUNTY PROPERTY.

The initial starting point is a determination of any applicable state law governing this issue in whole or in part. The state has addressed the issue in part with the enactment of A.R.S. §34-461. The statute provides:

34-461. Applicability of local codes; exception; definition

A. Public buildings shall be constructed in compliance with the state fire code unless a fire code has been adopted by the city, town, county or fire district in which the building is located. Public buildings shall be constructed in compliance with applicable building, plumbing, electrical, fire prevention and mechanical codes adopted by the city, town, county or fire district in which the building is located. The owner of the public building is subject to the same fees required of other persons. Public buildings are subject to inspection during construction pursuant to these codes to determine compliance.

B. If a public building is built in an area that has not adopted local codes, the building shall be designed or constructed according to the state fire code adopted by the state fire marshal and the building, plumbing, electrical, fire prevention and mechanical codes that apply in the largest city in the county in which the building is located.

C. Public buildings are subject to those codes that apply and are in effect when the building is designed or constructed and to the currently adopted codes when a building is found to be structurally unsafe, without adequate egress, or a fire hazard or are otherwise dangerous to human life.

D. Subsections A and B do not apply to state owned buildings except for the application of the fire code in effect where a state

¹ Powers of Irrigation and Water Conservation Districts are found in A.R.S. §48-2901, et.seq.

² Subsequently in 1940, the voters enacted a constitutional amendment defining the status of Irrigation Districts. Ariz. Cons. Art. XIII, Sec. 7.

owned building is located. State department of corrections facilities are exempt from the application of the local fire code in the absence of an intergovernmental agreement between the state department of corrections and the governmental entity responsible for enforcing any local fire code.

E. In this section "public building" means a building or appurtenance to a building that is built in whole or in part with public monies.³

Under this statute, public buildings constructed by the county regardless of the purpose that they serve must be constructed in accordance with applicable building, fire, plumbing, electrical and mechanical codes of the City.⁴

In constructing these buildings, it is the opinion of this office that such buildings are subject to the payment of development fees. First, the development fee statute requires such fees to be imposed on a non-discriminatory basis A.R.S. §9-463.05.B.5. Exempting the county would violate this provision. Second, the Arizona legislature recently enacted an exemption for schools from certain types of development fees. A.R.S. §9-500.18⁵ However, the language of the statute refers only to school districts and charter schools, which are only two of many different types of political subdivisions of the state. Had the legislature intended to exempt all political subdivisions, it would have used the general term, political subdivision of this state or other terminology.⁶

There are other areas where questions arise over the authority of the City that are not addressed by the public buildings statute. In these cases, the starting question is whether the conduct being engaged in by the County is proprietary or governmental. The governmental-proprietary distinction is important as courts have held that property used for governmental functions by a is not subject to zoning by the unit of government where the property is located. City of Scottsdale v. Municipal Court of the City of Tempe, 90 Ariz. 393368 P.2d (1962)

A governmental function is generally recognized as one undertake because there is a duty imposed on the entity for the welfare or protection of its citizens or a function that is fundamentally inherent in or encompassed within the basic nature of government. Copper County Mobile Home v. City of Globe, 131 Ariz. 329, 333, 641 P.2d 243, 247 (App.1982). Arizona courts have held that the provision

³ In 2005, the SB 1032 proposes to adopt similar language applying to remodeling projects. Again no generalized exemption is provided for units of government.

⁴ Buildings constructed by the State Board of Regents and the Community College System are specifically exempt from these requirements pursuant to statute.

⁵ The statute was enacted in 1999.

⁶ An example of this legislative intent can be found in A.R.S. §16-204.

of solid waste collection services, wastewater collection and treatment services, zoning and land use and education facilities are governmental in nature.⁷

A proprietary function is more of a commercial activity which directly competes with other commercial activities. Book-Cellar Inc. v. City of Phoenix, 150 Ariz. 44, 721 P.2d 1169 (App.1986). Previously, Arizona courts have found the provision of water, drainage, exhibition and fairgrounds are proprietary in nature. Book-Cellar Inc. v. City of Phoenix, 150 Ariz. 44, 721 P.2d 1169 (App.1986); Flowing Wells Irrigation District v. City of Tucson, 176 Ariz. 623, 863 P.2d 915 (Tx Ct. 1993)

As noted in the footnote below, while public buildings have traditionally been a governmental function exempt from review and regulation, the legislature has mandated their compliance with the applicable local building and safety codes. This mandate does not extend so non-safety types of regulation, such as design review, landscape and parking regulations. In the express authority to regulate public property these types of regulations would not apply to property used for governmental functions.

This analysis applies in cases where the County has leased the land from another governmental agency. The mere act of leasing land from the federal or state government does not convert a county function into a state or federal function. Rather the lease may contain terms binding the county and which must be included in any county use or lease to third parties. Ariz. Atty Gen. Op. 57-100 (1957).

Additionally, the proprietary/governmental distinction applies to fees charged by the City. The Arizona Constitution and statutes preclude the city from taxing other entities of government in some cases. As a result, it is first necessary to determine if the item is a fee for service as compared to a tax. Pursuant to the Arizona Constitution, property of the state, county and cities is exempt from property and use taxation. Ariz. Const. Article IX, Sec. 1. Similar exemptions from transaction privilege taxes (sales taxes) are provided in Regulation 270A-1 of the Arizona Model City Tax code for rental of property by a municipality to another municipal use.

Governmental activities are generally subject to fees as compared to a tax. A tax may be identified as meeting the following: (1) Identify the entity imposing the assessment; (2) the parties upon whom the assessment is imposed and (3)

⁷ Jones v. City of Phoenix, 29 Ariz. 181, 239 P.1030 (1925); City of Scottsdale v. Municipal Court of the City of Tempe—Wastewater collection services are governmental in nature; Board of Regents v. City of Tempe, 88 Ariz. 299, 356 P.2d 399 (1960)—Education is a governmental function and local land use regulations do not apply; Duran v. City of Tucson, 20 Ariz. App. 12 509 P.2d 1059 (1973)Public Buildings and Highways are governmental functions.

whether the assessment is for general public purposes, or for the regulation or benefit of the parties upon whom the assessment is imposed. May v. McNally, 203 Ariz. 425, 55 P3d. 768 (2002).

Governmental activities of the county are not subject to taxation. Pinal Vista Properties, LLC v. Turnbull, 208 Ariz 188. 91 P.3d 1031 (App. 1994) Generally, that light, impact fees have been defined by the Arizona Supreme Court as more in the nature of taxes than a direct assessment requiring an analysis of the benefit and burdens upon specific property. Assuming impact fees are a tax, they could not be imposed on governmental activities.⁸

However, the Arizona legislature has specifically enacted a non-discrimination clause for the imposition of impact fees, with the exceptions of school districts and public charter schools. Based on this legislative enactment, it is our position that governmental activities of the county are subject to impact fees, but not other forms of taxation.

Proprietary activities of the county are subject to taxation and fees, including the collection of transaction privilege tax. City of Phoenix v. City of Goodyear, 174 Ariz. 529, 851 P.2d 154 (Tx Ct. 1993). Income derived from fees for parks and recreational activities may be proprietary to the extent that the income was not for sustaining the upkeep and maintenance of the facilities, but for purposes of direct and indirect profit. City of Phoenix v. Moore, 57 Ariz. 350, 113 P.2d 935 (1941). Moore involved an attempt to impose sales taxes upon recreation fees. The Supreme Court noted that the fees charged by Phoenix were minimal and designed to defray a portion of the cost of the recreational uses as compared to full cost recovery.

Therefore as to the County the following principles can be applied:

1. Public buildings of the county must be constructed in accordance with adopted city fire, mechanical, electrical, plumbing and building codes.
2. The county are not subject to compliance with city zoning, design review, landscaping, signage, parking and similar regulatory requirements when constructing a building or developing property for a governmental function.
3. The City may not impose taxes upon governmental functions of the county, but may require governmental functions to pay applicable fees, including but not limited to development fees assessed under A.R.S. §9-463.05..
4. Proprietary functions of the County are subject to all city requirements and may be subject to payment of both taxes and fees.

⁸ See, Homebuilders Association of Central Arizona v. City of Scottsdale, 187 Ariz. 479, 980 P.2d 996 (1996)

5. Arizona courts have defined the following to be either proprietary or governmental in nature: Proprietary functions include leasing of personal and real property to third parties; exhibition and fairgrounds, water utilities. Governmental functions include solid waste collection services, wastewater collection and treatment services, zoning and land use, education facilities. Other functions of government must be individually analyzed in accordance with the tests set forth in this opinion.

For ease of reference, a conceptual matrix of these principles is attached.

III. NATURE OF THE IRRIGATION AND WATER CONSERVATION DISTRICT AS A MUNICIPAL CORPORATION.

Included within the City of Peoria is property of the Maricopa Water Conservation District, generally known as the Maricopa Water District. This is a special purpose district organized under A.R.S. §48-2901. This statute defines irrigation and water conservation districts as municipal corporations for all purposes. The question has been raised whether an irrigation and water conservation district has all of the powers, authorities, duties and legal privileges of an incorporated city. For the reasons outlined below, this office answers the question in the negative.

Irrigation and water conservation districts have been established to carry out the purposes of federal reclamation projects. The initial authorizing statute was enacted in Arizona in 1921. In 1940, a constitutional provision was adopted declaring irrigation and other types of tax levying public improvement districts to be political subdivisions of the state and vested with all the rights, privileges, benefits, immunities and exemptions granted to municipalities and political subdivisions of this state. Ariz. Const. Art.13, Sec. 7.

Unlike a charter (home rule) city, irrigation and water conservation districts do not have a constitutional grant of organic authority, rather they are defined as political subdivisions of the state. As a political subdivision, their grant of authority is through the state legislature.

In 1947, the Arizona Supreme Court rejected an irrigation district's argument that the county treasurer could not sell delinquent taxes owed to it the state, as its board had the power to waive and defer payment of taxes. Shumway v. Fleishman, 66 Ariz. 290, 187 P.2d 636 (1947).

Historically, the Arizona Courts have rejected the concept that an irrigation and water delivery district has identical powers to that of a municipality. Day v. Buckeye Water Conservation Drainage District, 28 Ariz. 466, 474, 237 P. 636, 638 (1925). The Court noted in Day "irrigation districts and similar public

corporations, while in some senses subdivisions of the state, are in a very different class. Their function is purely business and economic, and not political and governmental.”

The Court reaffirmed this analysis in State v. Yuma Irrigation District, 55 Ariz.178, 99 P.2d 794 (1940) The Supreme Court held that the general exemption for municipalities from taxation found in the Arizona Constitution did not apply to irrigation districts as they were not municipalities for all purposes. The Supreme Court described such districts as corporations organized for a public purpose.

Subsequently, the state enacted a constitutional amendment recognizing their exemption for tax purposes. Ariz. Const. Art. XIII, Sec. 7⁹. The Supreme Court then held in Taylor v. Roosevelt Irrigation District, 71 Ariz 254, 258, 226 P.2d 154 (1950) that the constitutional amendment did not remove or alter the governmental vs. proprietary analysis to determine their liability for torts. The Supreme Court noted: “We are of the opinion that the primary functions of these irrigation districts have not been changed by the Constitutional Amendment, supra, and in the conduct of their ordinary business, they are not exercising governmental or political prerogatives as they are not operated for the direct benefit of the general public, but only of those inhabitants of the district itself. “

Consistently, irrigation and water conservation districts are defined as municipal corporations when acting for a public purpose and when the activity is incidental to the primary purpose of the district. At the same time, the courts have rejected the assertion that an irrigation and water conservation district has all powers of a municipal corporation.

In City of Mesa v. Salt River Project Agricultural Improvement and Power District, 92 Ariz. 91, 100, 373 P.2d 722 (1962) the Arizona Supreme Court rejected an assertion that the City of Mesa could not deliver electricity in areas that were part of the Salt River Project noting: “While ordinarily two municipal corporations may not occupy the same territory and exercise the same authority and control over it and the population at the same time, ...this is true only as to governmental functions and not those of a proprietary nature.” The Supreme Court further held that an agricultural improvement and power district is an irrigation district not operated for the benefit of the general public, but only the inhabitants of the district itself. The attributes of sovereignty conferred upon it are only incidental to serve the purpose of better enabling it to function and accomplish the business and economic purposes for which it was organized.

The limitation on an irrigation and water conservation district to exist only for the business and economic purposes of irrigating arid lands was recognized in City of

⁹ Proclaimed and adopted upon approval by the voters in the November 1940 statewide election.

Scottsdale v. McDowell Mountain Irrigation and Drainage District, 107 Ariz. 117, 123, 484 P.2d 532, 538 (1971). The Supreme Court held that a district could not be formed for the purpose of developing a planned urban community with the irrigation district providing water for the lawns.

The Arizona Supreme Court again upheld the limitation of sovereignty of irrigation and water conservation districts in Santa Cruz Irrigation District v. City of Tucson, 108 Ariz. 152,153, 494 P.2d 24,25 (1972) The Court again noted that an irrigation district is essentially a business corporation with the attributes of sovereignty which are conferred for the purpose of better enabling it to function and accomplish the business and economic purposes for which it was organized.

More recently the limitation of sovereignty of irrigation and water conservation districts was again upheld in Flowing Wells Irrigation District v City of Tucson, 176 Ariz. 623, 624, 863 P.2d 915, 916 (Tax Ct. 1993). The Tax Court held that the provision of water to irrigate vacant lands is a governmental responsibility of an irrigation and water conservation district, conversely the provision of left over water to customers for domestic and potable uses is proprietary and subject to tax.

The decision of the Court of Appeals in Maricopa County v. Maricopa County Municipal Water Conservation District, 171 Ariz. 325, 328, 830 P.2d 846, 849 (App. 1991), Rev. Den. 1992 is frequently cited as giving irrigation and water conservation districts all powers of a municipal corporation. However, when the case is reviewed in light of all the other precedents, the Court of Appeals decision does not support such an expansive view of irrigation and water conservation district powers.

Maricopa County (County) arose out of a 1969 agreement between the County and the Maricopa County Municipal Water Conservation District (Water District) establishing the regional park at Lake Pleasant and authorizing the County to collect user fees to defray the cost of operating the park. The agreement was amended in 1984 to provide that the County would collect a user fee, a portion of which would be remitted to the Water District to defray the impact that the recreational facilities had upon the Water Districts property. Subsequently, the County sought a declaratory judgment that the amended agreement was not valid.

The Court of Appeals found that the validity of the agreement would hinge on whether the Water District could establish, maintain and assess public recreation at Lake Pleasant. The Court noted that the Water District was empowered under state statute to engage in any and all activities, enterprises and occupations within the powers and privileges of municipalities in general. At the same time the Court of Appeals noted that this power granted to the Water District under state

statute was not unlimited, rather it must meet two qualifications. First, the power to engage in the activities of a municipality is proper only when acting for a public purpose and second, when the activity is incidental to the primary purpose of the district.

The Supreme Court further defined these qualifications in Hohokam Irrigation and Drainage District v. APS. 204 Ariz. 394, 64 P.3d 836 (2003). The Supreme Court noted that the exercise by an irrigation and water conservation district of privileges and immunities granted to municipalities extend only so far as they have a legitimate relationship to the legal objectives for which the district is organized.

CITY AUTHORITY ON WATER DISTRICT PROPERTY.

The Water District may exercise those governmental powers granted to municipalities when acting for a public purposes and when there is a legitimate relationship to the primary purpose of the district. Hohokam Irrigation and Drainage District v. APS. 204 Ariz. 394, 64 P.3d 836 (2003), Maricopa County v. Maricopa County Municipal Water Conservation District, 171 Ariz. 325, 328, 830 P.2d 846, 849 (App. 1991) This include operation and maintenance of the irrigation and water delivery facilities, as well as the roads and telecommunications facilities necessary for these purposes. In acting in this regard, the Water District need not obtain the approvals or consent of the City.

Clearly, the Water District may charge entrance fees to defray its costs incurred from the recreational facilities at the Lake. To the extent that the fees only defray a portion of the cost and are not designed to cover all of the costs or make a profit, the fees are governmental in nature and not within the City's control, However, if the fees are designed to defray all of the costs, they the fees would appear to be proprietary and are subject to being treated as other proprietary activities. City of Phoenix v. Moore, 57 Ariz. 350, 113 P.2d 935 (1941)

In its exercise of governmental powers authority of the Water District is subject to the qualifications set forth above. The Water District does not have any general authority to exercise governmental powers as it is a political subdivision of the state deriving its powers only from the constitution and statutes. Hohokam Irrigation and Drainage District v. APS. 204 Ariz. 394, 64 P.3d 836 (2003)

The Water District is no different from other governments when it functions in a proprietary capacity. Flowing Wells Irrigation District v City of Tucson, 176 Ariz. 623, 624, 863 P.2d 915, 916 (Tax Ct. 1993) Its activities are subject to tax and regulation the same as other proprietary activities by other units of government.

Commercial activities of the water district such as marinas, recreational vehicle parks, restaurant and equipment rentals are proprietary in nature and subject to regulation and tax.

Therefore as to the Water District the following principles can be applied.

1. All Public buildings of the Water District must be constructed in accordance with adopted city fire, mechanical, electrical, plumbing and building codes. The Water District could elect to enact its own Fire, Mechanical, Electrical, plumbing, and building codes for its governmental functions only.
2. The Water District is not subject to compliance with city zoning, design review, landscaping, signage, parking and similar regulatory requirements when constructing a building or developing property for a governmental function.
3. The City may not impose taxes upon governmental functions of the county, but may require governmental functions to pay applicable fees, including but not limited to development fees assessed under A.R.S. §9-463.05..
4. Proprietary functions of the Water District are subject to all city requirements and may be subject to payment of both taxes and fees.
5. Arizona courts have defined the following to be either proprietary or governmental in nature: Proprietary functions include leasing of personal and real property to third parties; exhibition and fairgrounds, water utilities for the purpose of delivery of domestic potable water. Governmental functions include development and operation of irrigation and water delivery services to farms and arid lands, dams, irrigation pipes and structures, wastewater collection and treatment services if used for recharge or other water resources, parks and recreation facilities to the extent fees are charged only to defray a portion of the cost. Other functions of government must be individually analyzed in accordance with the tests set forth in this opinion.

Again a matrix is attached as an exhibit to this opinion to assist in applying its principles. I trust that this answers your questions in this matter. Should you have any further questions, please contact our office.

cc:Terry Ellis, City Manager
Honorable Mayor and Council

Opinion 2005-01
Meredith R. Flinn, Deputy City Manager-Development and Community Services
July 19, 2007
Page 11 of 11

=