



**ATTORNEY/CLIENT PRIVILEGED
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To: Hon. Supervisor Ally Miller

From: Regina Nassen, Deputy County Attorney
Tobin Rosen, Deputy County Attorney
Chris Straub, Chief Civil Deputy County Attorney

Date: October 6, 2014

Subject: Discretionary Small Awards by Individual Supervisors

Question Presented.

Supervisor Miller, you have asked whether you, as a member of the Pima County Board of Supervisors, can lawfully make small, discretionary, non-competitive awards to non-profit agencies or government organizations in the community, using funds budgeted for the operation of your individual Board-member office. These small awards would not be approved by the Board as a whole, nor would there be an associated formal contract with the recipient; the awards would be made by you, as an individual supervisor, and paid pursuant to Board Policies D29.3 and D29.4.¹ Per Board of Supervisors Policy, our office does not individually review or approve such expenditures,

¹ Section XI(E) of Board Policy D29.4, *Contracts Policy*, discusses "programs for awarding County funds to federally tax-exempt non-profit corporations and government agencies." The Policy indicates that, generally, such funding awards must be approved by the Board as a whole, and that the County will enter into a standard form of contract with the award recipient. Small funding awards, however—those that are less than \$5,000—"may be authorized and paid pursuant to Board Policy D29.3." That latter policy, the *Small Purchase Policy*, does not reference these funding awards specifically, but allows small purchases to be made by departments without formal competition, and allows payments to be issued based on a "Payment Request" or through use of a P-Card rather than pursuant to a formal contract. The small-award process described therefore appears to comply with these policies when read together.

nor does the Procurement Department, in the absence of a specific request.² However, such expenditures are subject to audit by the Finance and Risk Management Department.³

As a preliminary matter, we must point out that we are not advising you here in your individual, personal capacity. Our client is Pima County, and we generally provide representation to the County by advising the Board of Supervisors as a whole. Nevertheless, the County Attorney does, on occasion, advise individual County officers on matters relating to the duties of their offices.⁴ It is in that role—as the County’s civil lawyer advising you in your official capacity on a matter relating to the duties of your office, and not as your personal lawyer—that the Pima County Attorney’s Office is advising you here. Indeed, the County Attorney has an obligation to institute an action in the name of the County, against members of the Board or others, to recover funds that she believes have been illegally spent.⁵ Because individual supervisors could be held personally liable for authorizing illegal expenditures of County funds,⁶ you may wish to consult your own personal lawyer as well.

Legal Requirements.

General Principles:

Generally speaking, to be legal, a County expenditure must (1) be within the statutory powers of the County; (2) not constitute an illegal gift of County funds to a private party in violation of Ariz. Const. art. 9, § 7 (the “Gift Clause”); and (3) be made from appropriately budgeted funds.

Statutory Authority:

The County has those powers—and *only* those powers—expressly granted or necessarily implied by statute; a payment for a purpose that is not authorized by statute is illegal.⁷ The County’s outside-

² Board of Supervisors Policy D29.4, *Contracts Policy*, § VI(A).

³ Board of Supervisors Policy C2.6, *Internal Audit Function*.

⁴ A.R.S. § 11-532(7).

⁵ A.R.S. § 11-641(B). If a taxpayer makes a demand on the county attorney to bring such an action, and the county attorney does not do so, the taxpayer can institute an action. A.R.S. § 11-642.

⁶ A.R.S. § 11-641 through 11-643. See *Maricopa County v. Rodgers*, 52 Ariz. 19, 22, 78 P.2d 989, 990 (1938) (statute of limitations will not bar an action to recover public funds) (citing *City of Bisbee v. Cochise County*, 52 Ariz. 1, 78 P.2d 982 (1938)); *Avery v. Pima County*, 7 Ariz. 26, 38-40, 60 P. 702, 706-07 (1900) (supervisors are liable for an illegal payment regardless of “however excusable or unavoidable it may be, or however honest and diligent they may have been in the matter”); *cf. Webster v. Parks*, 17 Ariz. 383, 389-91, 153 P. 455, 458 (1915) (supervisors are liable for an illegal expenditure regardless of how “honest and conscientious” their actions were, but a mere procedural irregularity in approving or processing the expenditure will not give rise to liability if the payment is for a proper purpose). See also A.R.S. § 35-301, making it a class 4 felony for a “public officer ... charged with the receipt, safekeeping, transfer or disbursement of public money” to “[w]ithout authority of law, appropriate[] it, or any portion thereof, to his own use, or to the use of another.”

⁷ See, e.g., *Hartford Acc. & Indem. Co. v. Wainscott*, 41 Ariz. 439, 449, 19 P.2d 328, 331 (1933) (members of the Maricopa County Board of Supervisors held liable for repayment of amounts used to pay liability-insurance premiums for County vehicles because, at that time, the County could not be held liable for torts committed by its employees, and therefore the insurance policies only protected the employees rather than the County, and the County was not authorized to insure its employees against such liability).

agency program is based on the rationale that, if the County has the authority to undertake a particular activity or provide a particular service to the public, it can “outsource” that activity by providing funding to another entity to do the same. Likewise, the small awards can, we think, be justified if they are being used to fund activities that the County itself has statutory authority to undertake. The County⁸ has statutory authority to, among other things:⁹

- Conduct economic-development activities, which are very broadly defined.¹⁰
- Provide funds for affordable housing, so long as the property being used for the housing is restricted in manner that maintains its affordability.¹¹
- “Provide for the care and maintenance of the sick of the county,” “erect and maintain hospitals for that purpose, and “establish, maintain and operate” medical clinics.”¹²
- Fund summer youth employment and training programs for at-risk youth.¹³
- Impound, care for, and spay/neuter stray dogs and cats.¹⁴
- Provide for parks and recreational areas.¹⁵

Any County official making such a small award should ensure that it is being used to fund an activity that is within the County’s authority. We can provide assistance in determining the scope of that authority.

The State Constitution’s Gift Clause:

The Arizona Supreme Court has held that, to comply with the Gift Clause, a payment of public funds to a private entity¹⁶ must be for a public purpose and must be reasonable in amount in comparison to

⁸ The statutes generally vest this authority in the Board of Supervisors. The Board, by approving the policies cited previously, has arguably delegated authority to individual departments and offices within the County to make the type of small awards we are concerned with here, though the delegation is not express.

⁹ Obviously, the County has *many* powers and authorities; we are providing here citations to just a few statutes that seem likely to provide authority for the types of awards about which you have inquired.

¹⁰ A.R.S. § 11-254.04 authorizes the Board to “appropriate and spend public monies for and in connection with economic development activities,” which is defined as “any project, assistance, undertaking, program or study, whether within or outside the boundaries of the county, including acquisition, improvement, leasing or conveyance of real or personal property or other activity, that the board of supervisors has found and determined will assist in the creation or retention of jobs or will otherwise improve or enhance the economic welfare of the inhabitants of the county.”

¹¹ A.R.S. § 11-251.10. The statute technically refers to buying and conveying interests in real property. Logically, however, providing funding to another entity to acquire or improve real property is the functional equivalent of that.

¹² A.R.S. § 11-251(5) & (39).

¹³ A.R.S. § 11-1042.

¹⁴ A.R.S. §§ 11-1013 & 11-1022.

¹⁵ Arizona Revised Statutes, Title 11, Chapter 7, Article 2.

the consideration that the private entity is providing in exchange for the funds.¹⁷ Courts are very deferential regarding a political branch's determination of what constitutes a public purpose. They are less deferential when it comes to valuation of consideration, which is based on the fair market value of what the party receiving the payment is promising to provide, rather than speculative assessments regarding "public benefits." Nevertheless, the Gift Clause requires only that the value of what the public entity is receiving not be "grossly disproportionate" to what it is paying.

As noted above, the County's outside-agency contracts require the non-profit organization receiving the County funds to carry out certain activities or provide certain services that further a public purpose. Therefore the public benefit requirement is satisfied with respect to those expenditures. And the County funds provided to the outside agency are used to cover the expenses (often just a portion of the expenses) incurred by the agency in carrying out the required activity. The reasonableness of those costs is reviewed as part of the outside-agency program process;¹⁸ therefore, the outside-agency expenditures also satisfy the second prong of the Gift Clause test. The small awards in question would not be accompanied by formal written contracts, but—provided that reasonable assurances have been obtained that the funds are being used in a manner that satisfies the Gift Clause, and there is some documentation to demonstrate that—the expenditures should survive a Gift Clause challenge.

Statutory Budget Laws:

After adoption of a final budget, a county may not "spend money for a purpose not included in its budget" or "spend money ... in a fiscal year in excess of the amount stated for each purpose in the finally adopted budget for that year."¹⁹ If an expenditure of County funds is made for a purpose to which those funds are not allocated in the budget, the funds are considered to have been spent illegally.²⁰

The 2014/15 budget allocates approximately \$400,000 to each supervisor's office.²¹ This amount is divided between "Personnel Services" and "Operating Expenses." The small awards we are

¹⁶ The Gift Clause is generally inapplicable to a transfer of funds to another government entity although, it would of course be problematic if the transfer is done with the understanding that the funds will be used by the receiving entity for a purpose that violates the gift clause.

¹⁷ *Turken v. Gordon*, 223 Ariz. 342, 348-349, ¶¶ 22 & 28, 224 P.3d 158, 164-165 (2010). In *Turken*, the Court implied that it might not even subject certain "non-contractual public expenditures, such as direct assistance to the needy" to a Gift Clause analysis. *Turken* 223 Ariz. at 348, n.4. That appears, however, to be limited to services rendered by a government entity *directly* to benefitted individuals, not payments to organizations that utilize the funds to provide a public benefit.

¹⁸ See Board of Supervisors Policy E 36.1, *Review of Requests and Monitoring of Contracts for Discretionary Funds Allocated to Outside Agencies for Economic Development, Health and Social Services*.

¹⁹ A.R.S. § 42-17106(A).

²⁰ See, e.g., *City of Phoenix v. Kidd*, 54 Ariz. 75, 85, 92 P.2d 513, 518 (1939) *on reh'g*, 54 Ariz. 123, 94 P.2d 428 (1939) (a contract that requires an expenditure in violation of the budget law "is void and cannot be enforced"); *Coleman v. Lee*, 58 Ariz. 506, 508-509, 121 P.2d 433, 434-435 (1942); *Lee v. Coleman*, 63 Ariz. 45, 50, 159 P.2d 603, 605 (1945); *Barbee v. Holbrook*, 91 Ariz. 263, 264-65, 371 P.2d 886, 887 (1962).

²¹ See Pima County Fiscal Year 2014/15 Recommended Budget, p. 2-8.

analyzing here would be paid out of “operating expenses” allocated to the office of the supervisor making the award. We could not find a copy of the final budget online but, if it is like last year’s final budget, it does not contain any more detail than that basic breakdown. “Operating expenses” is a broad category that might legitimately encompass numerous large and small expenses of various types, including, arguably, small awards like those we are discussing. Therefore, if the awards are made using these funds, they would arguably be made from properly budgeted funds.

Someone challenging the legality of these small awards could, however, make a colorable argument that they cannot be fairly characterized as “operating expenses,” which might normally be understood to mean office-related expenses like furniture, equipment, supplies, etc. Do these awards really fall within the stated “purpose”? Paying the awards from the office’s operating-expense budget is arguably unanticipated since these types of expenditures are more typically made under the budgets of other departments, such as Community Services, Employment & Training, and Economic Development & Tourism.²² Therefore, the “operating expense” label does little to alert taxpayers to how the money is being spent, which is one of the purposes of the budget laws.²³ The fact that the awards are not reviewed and approved by the Board as a whole in a public meeting arguably compounds the problem.

On the other hand, lump-sum appropriations are clearly permissible; the adopted budget need not spell out each specific item or type of expense that can be paid out of a more generally labeled line item.²⁴ There is also a legitimate reason for not making the final budget too detailed. Because the Board as a whole must vote to approve a transfer of funds from one final-budget item to another, a more detailed final budget would create significant administrative difficulties.²⁵ And the Recommended Budget *does* show an itemized breakdown of supervisors-office “Operating

²² See Recommended Budget, p. 3-2 (“The Recommended Budget includes \$4,990,328 for outside agencies. This amount includes: \$3,435,167 in the Community Development & Neighborhood Conservation department; \$1,246,775 in the Economic Development & Tourism department, \$123,000 Community & Economic Administration, and \$185,386 in other departments.”).

²³ *City of Phoenix v. Kidd*, 54 Ariz. 75, 83, 92 P.2d 513, 517 (1939) *on reh'g*, 54 Ariz. 123, 94 P.2d 428 (1939) (“‘The evident purpose of the ‘Budget Law’ is to establish the plan of ‘paying as you go’; also to allow the taxpayer an opportunity to object to any proposed expenditure, or the amount thereof, by the board of supervisors’”) (quoting *Fullen v. Calhoun*, 39 Ariz. 40, 3 P.2d 786, 787 (1931)).

²⁴ The Arizona Supreme Court, in *Coleman v. Lee*, a 1942 case, rejected a claim that the board of supervisors could not legally pay for services related to administration of an indigent healthcare program from a lump-sum budget item labeled simply “indigent sick.” 58 Ariz. 506, 509, 121 P.2d 433, 435 (1942) (“we see no reason why the board of supervisors could not make the appropriation in the budget in a lump sum, leaving to those whose duty it is to spend such sum the power and right to apportion it as the law permits”). Successful challenges, in contrast, involved payments in excess of the amount budgeted for the appropriate line item. See, e.g., *City of Phoenix v. Kidd*, 54 Ariz. 75, 90, 92 P.2d 513, 519 (1939) *on reh'g*, 54 Ariz. 123, 94 P.2d 428 (1939) (illegal for City to pay workers additional amounts to comply with increased minimum wage law that was passed after adoption of City budget because that would cause the amount spent to exceed amount budgeted); *Lee v. Coleman*, 63 Ariz. 45, 50, 159 P.2d 603, 605 (1945) (travel expenses of supervisors traveling to road-related meetings were incorrectly paid from general road fund rather than from funds budgeted specifically for board-of-supervisors-travel; therefore, supervisors had to repay any amounts that would have caused the travel-fund budget to be exceeded if the expenses had been paid from that fund as required); *Barbee v. Holbrook*, 91 Ariz. 263, 264-65, 371 P.2d 886, 887 (1962) (action to recover from supervisors funds paid in excess of budget).

²⁵ A.R.S. § 42-17106(B).

Expenses” that includes a line item (\$42,295) for “Payments to Agencies,”²⁶ which we assume refers to small awards of this type. That greater detail arguably informed taxpayers, before adoption of the final budget, that expenditures of this type were being authorized. Individual small awards to agencies can also be monitored by the public through the Open Books website.

Conclusion.

We conclude that a supervisor’s office can legally make small funding awards from its budgeted operating expenses, provided that the award is for a specific documented public purpose that is within the County’s statutory authority, and is reasonable in amount. If someone were to challenge such a small award based on an alleged violation of the budget law, it is possible that a court would find it to be problematic, but we believe it is more likely than not that a court would uphold the expenditure.

Recommendation.

If you wish to eliminate any question regarding the legal authority for these small awards, the Board of Supervisors could adopt a policy, or amend an existing policy, to explicitly delegate authority for these awards to individual supervisors. Alternatively, the Board could affirmatively prohibit such awards. We are, as always, available to review proposed policy language before it is presented to the Board to help determine whether it will achieve the Board’s desired goal and not result in unintended consequences.

Cc: Sharon Bronson, Chair, Pima County Board of Supervisors
Richard Elías, Vice-Chair, Pima County Board of Supervisors
Ramón Valadez, Supervisor, District 2
Ray Carroll, Supervisor, District 4
C.H. Huckelberry, County Administrator
Barbara LaWall, Pima County Attorney
Amelia Cramer, Chief Deputy County Attorney

²⁶ See Recommended Budget, p. 2-11.