

Briefing Report Number 2



Recommendations on Local and Regional Trust Funds

Prepared for:



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**FINAL
REPORT**
Amended 08/06/2008

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April 16, 2008
Amended July 30, 2008 (FI)
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Teresa Brice and Gary Bachman

RE: Progress on Housing Trust Fund research

Dear Ms. Brice and Mr. Bachman,

We are writing to share our final research results for the legal research we began in February on the issues involved in creating local and regional housing trust funds.

Before we present our findings, a summary of our operating assumptions is in order; these assumptions have played a key role in our research and conclusions. If you believe any of the assumptions are incorrect, please let us know at your earliest convenience; we will then reevaluate the conclusions accordingly.

A. ASSUMPTIONS

1. The research activity is a preliminary investigation into the legal viability of several funding sources for the Housing Trust Fund. It is not meant to be an authoritative legal opinion or advice. The researchers are law students, and are not licensed to practice law in the state of Arizona.
2. The bodies of law researched are statutes and published appellate decisions effective March 14, 2008. The following jurisdictions were researched, as they are controlling for Arizona: Arizona state courts, Arizona federal district courts, Court of Appeals for the Ninth Circuit, and the United States Supreme Court. Any statutes or case law that become effective after March 14, 2008 (or are published post-March 14th and are effective retroactively) were outside the research scope.
3. The research is conducted in partnership with Joseph Silins and Brett Trani, interns from the University of Arizona. The division of responsibilities is as follows: Joseph/Brett provide extant or conceptually-new funding sources, and Florin/Fenlene research the

legal viability of each source.

B. SCOPE OF RESEARCH

There are two main goals for the research:

1. To determine the revenue potential (net of administration fees) vis-à-vis the public burden/opposition. Joseph and Brett are focusing on this aspect in a separate work stream.
2. To determine the extent to which each funding source could be subject to legal challenges by citizens or government entities. Florin and Fenlene are focusing on this aspect.

C. PREFACE ON CHARTER COUNTIES AND CITIES

County- vs. City-level Housing Trust Funds. Arizona law establishes general-law as well as charter counties and cities. General-law counties (and, by extension, charter counties) can establish county-level housing trust funds, pursuant to A.R.S. § 11-381. In contrast, Arizona does not provide enabling legislation for general-law cities to establish city-level housing trust funds. To enact a city-level program, general-law cities must either petition the Arizona legislature to amend A.R.S. Title 9 to grant such powers to cities, or work with the county-level housing trust fund to support city housing efforts. Charter cities, on the other hand, may create city-level housing trust funds if the city charter allows (e.g., Tucson), or amend the charter to contain trust-fund enabling provisions.

D. FUNDING SOURCE SUMMARY

In Arizona, a county or city can raise funds only as prescribed by the Arizona legislature. Even though A.R.S. § 11-381 establishes the Housing Trust Fund, § 11-381 prescribes only the *process* for managing and funding the program; it does not prescribe specific exactions that a county or city can enact to directly source the trust fund... other than noting that three *types* of funding can be used:

1. Monies appropriated by a county board of supervisors to the fund.
2. Any private, federal, state or local government grants, gifts, appropriations and monies designated by law for deposit in the fund.
3. Investment earnings of the fund.

The present report discusses several specific fees and taxes a county or city may exact for

sourcing the Trust Fund. We present the enabling statute for each exaction, as well as highlight provisions that may limit the use of resulting revenues.

In summary, most of the sources are part of one of two categories:

1. **Fees** – Typically used to provide a direct present benefit--or a good-faith direct future benefit--to the entities that pay the fee. For example, a developer fee imposed by a city must go toward providing infrastructure or other services that benefit the development. Hence, a municipality's use of a fee is not completely discretionary.
2. **Taxes** – Typically used to fund general activities by a government entity. The tax revenue need not directly benefit the specific activities of the individuals who pay the tax, though they must be used for public purposes.
 - a. Article 9 §1 of the Arizona Constitution requires a given tax to be uniformly applied upon similar classes of property within the jurisdiction that levies a given tax. However, Article 12 § 9 allows charter counties to set up “jurisdictional pockets” that may each have differing tax rates, though the rates within a given “jurisdictional pocket” must be uniform.

The structure of an exaction (i.e., whether it is implemented as a fee or as a tax) can often affect the permitted uses of the ensuing revenue. Also, the means by which revenue from the source is appropriated to a county program can also affect whether the source is permissible.

E. MEANS OF APPROPRIATION

There are two primary means for implementing a funding source once it is deemed "valid":

1. **General appropriation** -- city, county, and state governments may appropriate or grant monies into the trust fund... monies that are otherwise held in either general or specific funds. For example: the county increases property taxes (one of the sources for low-income housing) by 0.5%, which is expected to result in \$500,000 incremental revenue to the county; these proceeds are held in the county's general fund. The county then increases its appropriation to the Housing Trust Fund by up to \$500,000. Note that the incremental tax is not directly deposited into the trust fund; instead, it is indirectly apportioned by the county.

This type of appropriation is traditionally at lower risk of legal challenge, but may be hampered by political or bureaucratic pressures. Also, since some funding sources must, by law, be managed in separate funds, transfers between said funds and the Housing Trust Fund may have certain restrictions. These will be

addressed in the detailed analysis of each funding source.

2. **Earmarked appropriation** -- city or county fees/taxes/etc. can be earmarked such that, upon collection, the revenues are directly routed into the Housing Trust Fund. For example: County enacts an ordinance that imposes a special "Low Income Housing" fee against developers for converting apartment buildings into condos. The ordinance specifically requires these revenues to be paid into the Housing Trust Fund. This type of appropriation is more open to legal challenges, but it is also less prone to political budget limitations.

F. OVERVIEW OF LEGAL PRINCIPLES

Legal challenges against a given funding source can arise from three constituencies: (1) city governments; (2) state or federal governments; and (3) taxpayers. Each is addressed separately.

1. City Governments

There are two principal reasons why a city government would sue the county on account of a funding source. First, if the implementation of the funding source requires a city to exact the tax as part of its activities (e.g., exacting a new or increased fee when issuing building permits) and the city resists, it could choose to bring a suit. Second, in cases where the city does not object to implementation, but objects to being required to turn over ALL of the revenue thus captured to the county, rather than use it for city-specific programs. We are not privy to how likely either of these types of lawsuits are.

The general ability of a county to require its cities to pass certain legislation that implements a county program is supported by A.R.S. § 11-251.05(A)(1). Specific challenges to specific ordinances may still be possible. However, we posit that the risk of this type of legal action is low.

2. State or Federal Governments

The principal reason why state or federal governments would sue the county on implementation of specific funding sources is if the county's measure is in conflict with either a state or federal law. Since the Housing Trust Fund is enabled by state law and has not been challenged per se, we do not foresee sustainable challenges to the program itself. However, specific funding sources may clash with a state law; for example, luxury taxes are preempted by the state. We have not found significant conflicts to date; hence, we posit that the risk of this type of legal action is low.

3. Taxpayers (individuals or businesses)

This is the group from which we expect most of the legal challenges, if any, to arise. To date, none of the proposed funding sources seem to be *per se* prohibited by state legislation, the Arizona constitution, or case law (with the exception of the luxury tax, discussed in F.15). There is a referendum measure to amend the Arizona constitution such that it prohibits a "real estate transfer tax," but the likelihood of this measure's success is uncertain.

Most legal challenges would arise for one or both of the two following reasons:

1. **Weak nexus between the use of fee revenue and the activity subjected to the fee.** In order for a "fee" to withstand legal scrutiny, there must be a nexus (or *reasonable relationship*) between the use of fee revenue and the underlying activity that is subjected to the fee. Otherwise, the fee may be found to violate either specific state law provisions or the Fifth and Fourteenth Amendments of the United States Constitution. In Arizona, fees are presumed valid unless the party challenging the fee proves a weak or absent nexus. Two instances where fees were upheld were as follows:
 - a. *Home Builders Ass'n v. Scottsdale*, 930 P.2d 993 (Ariz. 1997). This case was decided by the Arizona Supreme Court. It involved a "water resources development fee" that was imposed against developers by the City of Scottsdale, pursuant to A.R.S. § 9-463.05. The court upheld the fee, noting that the plaintiff failed to prove that the fee was not rationally related to a legitimate governmental interest. The fee was presumed valid absent such showing.
 - b. *Commercial Builders of Northern California v. Sacramento*, 941 F.2d 872 (9th Cir. 1991) ("*Commercial Builders*"). This case was decided by the federal Court of Appeals for the Ninth Circuit, and was based on a federal Constitutional challenge. In *Commercial Builders*, developers contended that a Sacramento city ordinance which conditioned the issuance of certain nonresidential building permits on the payment of a low-income-housing fee was unconstitutional, citing the Fifth and Fourteenth Amendments of the United States Constitution. The United States Court of Appeals for the Ninth Circuit disagreed, holding that the ordinance was constitutional because the ordinance's legislative findings clearly established a nexus between growth in the demand for low-income housing and the type of development activity that incurred the fee. (In passing the ordinance, the city of Sacramento found that low-income workers were migrating into the city in order to work on the very type of projects in which the

developer taxpayers were engaged. The influx of low-income workers increased demand for low-income housing, which prompted the city to raise additional funds via the "low income housing" fee.) The Supreme Court declined to review the case in 1992, which means that the circuit court's decision stands. Since Arizona is part of the Ninth Circuit (as is California), this decision can be binding on Arizona cases.

2. **Discrimination against interstate commerce.** Some taxpayers may contend that a fee or a tax discriminates against interstate commerce in a way that imposes an excessive burden on out-of-state consumers or providers of goods/services. Though most of the funding sources may not be at risk from this type of challenge, the "Bed Tax" is one that might be, depending on the aggregate effect on commerce. At this time, however, we believe that the risk of this type of challenge is low.

G. DETAILED ANALYSIS OF SPECIFIC EXACTIONS/SOURCES

1. General funds

Appropriating general county funds to the Housing Trust Fund is the most expedient option. The practice is supported by A.R.S. § 11-381(B)(1), and has not been challenged by any case in an Arizona state court.

2. Interest income

There are two types of interest income that can be used as a source: (1) interest that accrues on monies in the Housing Trust Fund itself; and (2) interest that accrues on general-fund monies. Using both as sources for the trust fund appears to be legal, though under different statutes: interest from trust fund monies is permitted by A.R.S. § 11-381(B)(3); and interest from the general fund is allowed as a general county appropriation under A.R.S. § 11-381(B)(1).

3. Recording fee

Recording fees are set by A.R.S. § 11-475. If the current fees are lower than the fee ceiling set by § 11-475, the actual fees can be increased without the need for amending the statute. Otherwise, the statute must be changed by the Arizona legislature to increase the fee ceiling.

Recording fees are paid into the county treasury's general fund, pursuant to A.R.S. § 11-414(a). Therefore, a portion of the revenue

from said fees can be appropriated to the Housing Trust Fund (as a general appropriation) without the need for establishing a nexus. *[Note – there is some dispute as to how these fees can be used. Further research may be warranted if this is a revenue source being considered.]*TB

4. Real estate transfer tax

A.R.S. § 11-1132 establishes a \$2 transfer fee for each real estate contract, in addition to recording fees allowed by § 11-475. The revenue from the transfer tax is disposed of in the same manner as the recording fees, which means that it is paid into the county treasury's general fund... and can be generally appropriated to the Housing Trust Fund. The Arizona legislature can be petitioned to increase the transfer fee amount, if necessary.

5. Conversion fees

Conversion fees are imposed on developers who convert one type of real property to another, such as apartments into condos. The fee *per se* is allowable under current state law as a "development fee," and should be exacted as part of the construction-permit procurement process. If the fee ordinance is passed at the county level, it is supported by A.R.S. § 11-1102; if at the city or town level, it is supported by A.R.S. § 9-463.05. For cities that do not have existing ordinances for building-permit issuance, A.R.S. § 11-321 defaults the permit issuance responsibility to the county.

In order for the fee to pass legal muster, a nexus must be established between the conversion project and low-income housing (which the fee supports). One possible nexus is that conversion of apartment buildings into condos is displacing lower-income individuals who would have otherwise rented the apartments. Since the city/county needs to provide increased low-income housing services to these displaced individuals, the only way the developer can proceed with the conversion is if the city/county has enough low-income housing units to offset the displacement. Therefore, low-income housing services (which the fee subsidizes) directly benefit the project by allowing it to move forward.

These fees will be best sustained in areas of the county/cities where apartments inhabited by lower-income residents are converted to condos or higher-income residences. Otherwise, it might be difficult to show that lower-income residents were at risk of being displaced.

6. Demolition fees

Similar to the "conversion fee," the demolition fee is a "development

fee," and is thus supported by A.R.S. § 11-1102 (county) and A.R.S § 9-463.05 (city or town). If the fee is assessed against demolition of buildings that cause displacement of low-income citizens, the county, city or town can establish a sufficient nexus between the demolition activity and the Housing Trust Fund.

7. Developer proffers

One approach is to condition the issuance of new building permits on the payment of such a fee. In this scenario, the fee is a "development fee" (see discussion under *Conversion Fees*), and is supported by A.R.S. § 11-1102 (county) and A.R.S § 9-463.05 (city or town).

One possible nexus between the fee and low-income housing is that, with the depression of the housing sector, construction-worker income has decreased, which increases the need for low-income housing. Alternatively, the county would need to show that an influx of low-income construction workers has occurred (or will most likely occur), which increases (or will increase) demand in low-income housing. Either situation will make the situation similar to *Commercial Builders*, and courts will most likely uphold the fee.

8. Linkage fee

Linkage fees are assessed primarily against commercial or industrial development projects for "necessary public services" provided by a municipality to said development project. Low-income housing can be one type of "necessary public service." (The terms "linkage fee," "in lieu fee" and "impact fee" are sometimes used synonymously.)

California is one of the states whose key municipalities require developers of commercial office buildings to either build low-income housing (X% of low-income housing square-footage for every square foot of office space) or pay a fee *in lieu* of building said housing... fee that goes directly into municipal trust funds for low-income housing projects. The nexus between low-income housing and the commercial development was the increased need for low-income housing as a result of an influx of low-income construction workers. This concept is illustrated by the *Commercial Builders* case discussed in section E.3.1.b of this document.

In Arizona, a linkage fee is a type of development fee. Such a fee is allowed to be imposed by a city under A.R.S. § 9-463.05, if the fee provides a "necessary public service" to the development project. Low-income housing can be deemed a "necessary public service" for the same reasons as in *Commercial Builders*: the builder uses low-income workers, and they cause an increase in demand for low-

income housing. If no fee is exacted for building new low-income housing units, low-income housing capacity cannot sustain the increased demand, and the project's permit cannot be approved since the project would bring a surge in low-income-housing demand that cannot be handled.

9. Food & beverage tax

The county and cities can increase the sales tax of restaurants and use the incremental revenue for low-income housing. A.R.S. § 42-5102 permits taxing of restaurants, which would enable the use of this funding source. According to A.R.S. § 42-5164, excess tax funds are deposited in the county's general fund. As such, no benefit nexus is required, and the county can make a general appropriation of funds to the Housing Trust Fund.

10. Bed tax

A “bed tax” is a tax imposed by local government on hotel stays. The benefit is that the taxed parties are usually outside of the electoral base (most hotel guests are from outside the jurisdiction), and therefore are less inclined to protest. Although there is no specific “bed tax,” A.R.S. 42-6108 and 42-6108.01 (titled “tax on hotels”) allows a county to tax every businesses or person “engaging or continuing in the county in a business taxed under chapter 5 [of title 42] and classified under section 42-5070” (i.e., transient lodging, such as hotels, motels, boarding house, transient RV/trailer, and many other forms of transient lodging).

However, 50% or more of this tax must be used to “promote and enhance tourism through the recognized tourism promotion agency in the county.” A.R.S. 42-6108(C). The other 50% must be used: (a) up to 34% pursuant to A.R.S. 48-4204 (A) for constructing and operating a stadium; and (b) up to 16% for economic development (economic development can be construed to include low-income housing support).

11. Property tax

Ad valorem taxes on property may be levied by the county under Arizona’s Constitution Art. IX §19. However, unless the tax is earmarked for a cause that falls under Arizona’s Constitution IX §19 or voters vote for a higher tax, the tax may not be increased more than 2% from the previous year.

The amount that may be collected for a primary property tax has strict guidelines under §42-17051. Any amount that exceeds the allowable amount under this section must be subtracted from the tax liabilities the following year. These funds all enter the general

county fund and are subject to number of existing ear marks. It would be beneficial to consider the fiscal status of a county's general budget before pursuing an earmark for funds.

Under §42-17203, the board of supervisors may conduct an election to authorize a special secondary property tax to fund the housing trust fund. This measure requires the board of supervisors to submit a resolution for a general vote. This resolution must include:

- a. The number of years in which the authority to levy taxes in excess of the limitations otherwise prescribed is to be in effect. The board shall not request authority from the voters for a period of less than two years nor more than seven years.
- b. The purpose for providing revenue to the county.
- c. The maximum dollar amount of secondary property tax that may be collected in each year of the authority if voters approve the levy.
- d. The estimated secondary property tax rate that will be levied in the first year if the voters approve the levy.

The board may use the money raised from such a tax for the purposes stated in the resolution so the board must propose a specific property tax that will be used to raise funds for a housing trust fund.

12. Roof top fee

A roof top fee was previously considered and implemented by Pima County in 2005.

<http://www.co.pima.az.us/CED/CDNC/documents/winternewsletter05.pdf>.

Any county wishing to use this source should assess the enabling legislation for this fee and determine whether there are any legal risks with the approach chosen for implementation.

13. Parking garage revenues

Fees collected from the use of county parking facilities have also been tapped for a number of different uses. Revenue generated from parking around schools is strictly limited to operating and securing the parking facility under A.R.S. 15-342. Funds generated from parking near stadiums and other entertainment facilities are ear marked for the use of constructing and maintaining a stadium.

14. Red light cameras fines

Although there is no authorizing statute, the City of Mesa and, recently, the City of Scottsdale (both charter cities) have implemented very successful speeding fine programs based on the use of speeding cameras. This use of speeding cameras has successfully withstood five years of litigation. <http://www.stopredlightrunning.com/pdfs/StopOnRedSafeOnGreen.pdf>

15. Luxury Tax--§42-3002

Luxury taxes are preempted by the state.

H. NEXT STEPS

The initial research has been concluded. We hope that cities and counties will leverage the information to decide the best options that meet their long-term objectives. It will be rewarding for us to know that our input was part of creating something bigger than ourselves, and contributed to affordable housing initiatives in this state.

We are open to answering questions about the research and would be glad to discuss the above findings in detail. Our contact information is as follows:

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Sincerely,

/s/Fenlene Hsu
FENLENE HSU

/s/Florin Ivan
FLORIN V. IVAN

We appreciate the time and effort provided pro bono by these law students. So as not to impose on them, please send any questions or comments on this report directly to:

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I will compile any feedback and take it to the Steering Committee to determine the extent of any additional research.



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Report on Potential Housing Trust Fund Revenue Sources

By Brett Trani & Joe Silins, Interns

and

Florin Ivan & Fenlene Hsu, Law Students

Introduction:

In 1997 voters in Pima County established a Housing Trust Fund to assist the County's low-income residents purchase and improve housing. In November of 2004 the County Board of Supervisors created an eleven member Pima County Housing Commission to provide oversight for the Trust Fund. While these two events outlined the framework for the County's trust fund, no dedicated source of revenue was established, leaving the trust fund present on paper but ultimately unfunded. The creation of a roof-top fee in 2005 was a step towards funding the trust, but for reasons that will be discussed later in this report, the fee has collected little money to this point.

This report will examine the various options that Pima County has to fully and continuously fund the Housing Trust Fund, and allow it to accomplish its goal of providing housing assistance to low-income residents. Local housing trust funds from across the nation were examined to identify potential funding sources, and then these sources were evaluated to determine their suitability for use in Pima County. Additionally, in conjunction with two law students from ASU, Florin Ivan and Fenlene Hsu, the existing legal framework and potential legal issues were determined for each potential funding source. While evaluating specific funding sources, special emphasis was placed upon finding continuous, dedicated revenue sources with a goal of \$2 million annually in trust fund revenues. Ultimately, due to the sluggish nature of the housing market and the economy, and the resulting governmental budget woes, these recommendations may serve as a long-term map rather than an immediate action plan.

Potential Funding Sources

- **Recording fee**

General Information - This is a fee charged by the County recorder's office for the production of documents and maps. In 2007, over 280,000 recordings were processed, with 1.4 million pages printed. These fees range from a minimum of \$9 for the general public up to a maximum of \$259, which combined with the high volume of pages processed creates a significant source of revenue. As of the middle of 2007, this office had excess funds amounting to almost \$4 million. While a large amount of these funds was used in late 2007 to comply with identity theft regulations these fees do represent a promising source of revenue. During FY 2007-2008, the Recorders Office is expected to generate nearly \$5 million in revenue, and while this department does receive some General Funds for operational costs, in the same year \$843,019 were transferred to the General Fund for 'General Fund Support.' A portion, or all, of these funds could be used as a dedicated funding source for the Trust Fund, and since the demand for document recording is relatively inelastic, this is one of the more dependable potential sources.

Legal Basis – Recording fees are set by A.R.S. § 11-475. If the current fees are lower than the fee ceiling set by § 11-475, the actual fees can be increased without the need for amending the statute. Otherwise, the statute must be changed by the Arizona legislature to increase the fee ceiling.

Recording fees are paid into the county treasury's general fund, pursuant to A.R.S. § 11-414(a). Therefore, a portion of the revenue from said fees can be appropriated to the Housing Trust Fund (as a general appropriation) without the need for establishing a nexus.

- **Bed tax**

General Information – This tax, levied on hotel occupants at the rate of 6%, is used to fund tourism related activities, Tucson Regional Economic Organization, and a stadium district. The tax was just raised from 2% to 6% in 2006 to put it on par with Tucson and Marana's tax, which makes another increase unlikely for quite some time. Also, since this tax is restricted to funding the activities listed above, the State Statute governing this tax would need to be amended in order to appropriate these funds for the Housing Trust Fund. Although these restrictions limit the use of this tax for the Pima County Housing Trust Fund, many other local governments have recognized the nexus between the low wages that hotels typically pay workers and the need for affordable housing, and utilized these taxes as funding sources.

- **Real Estate Transfer Tax**

General Information – The state currently collects a fee of \$2 per deed recorded. Many states utilize this tax to fund their housing trust funds, usually by levying a tax on the sale amount of a house. It is important to provide a mechanism to exempt low-income buyers and sellers from this tax, which can be done by not taxing a certain portion of the sale amount, for example up to \$75,000 of the total sale price. In general, realtors and developers are against this tax, as it adds to the total cost of the home and can be seen as a barrier to homeownership among those not exempt. Multiple legal battles have been waged for and against this tax throughout the country, so there may be a stiff legal challenge if this were implemented in Pima County. Since this tax does rely on real estate transfers, revenues depend on the health of the housing market and local economy.

Legal Basis – A.R.S. § 11-1132 establishes a \$2 transfer fee for each real estate contract, in addition to the recording fees in § 11-475. The revenue is disposed of in the same manner as the recording fees, which means that it is paid into the county treasury's general fund and can be generally

appropriated to the Housing Trust Fund. The Arizona legislature can be petitioned to increase the transfer fee amount.

- **Development Impact Fees**

General Information – Development impact fees are one method of offsetting the impacts of development, and were first widely implemented in the 1980's. Many local governments prefer these fees to older forms of exactions because they generally aren't required to be spent in the immediate vicinity of the development they're being assessed against. Arizona, however, has placed restrictions on the use of these "development fees", limiting them to uses that benefit the developments that they are levied against. Another limitation on these fees is that they must be assessed in a rational manner, one which quantifies the impact that the specific development will have on the jurisdiction, such as the increased strain placed upon local roads and other services. Revenue from these fees is also highly dependent upon the health of the local housing market.

Legal Basis – A.R.S. § 11-1102 gives counties the authority to assess development fees to offset the capital costs of future infrastructure and public services provided to a development. These fees are assessed at the time building permits are issued, and in the event that a city doesn't have the authority to issue building permits, the permit issuance authority, and thus the fee authority, defaults to the county.

Since this is a fee-based revenue source, a nexus needs to be established between these fees and the affordable housing that they will subsidize. A potential nexus could be the increased number of construction and service workers needed to build and serve a new development, and the resulting increase in the need for affordable housing. This provision of affordable housing could then be considered a "public service", thus potentially fulfilling the conditions of the Statute that governs county development fees.

- **Developer Proffers**

General Information - These contributions from developers are generally used in the absence of local authority to issue impact fees, and are often assessed in conjunction with the issuance of a building permit. The specifics of these donations are generally negotiated between developers and local governments. Similar to other local fees, to withstand possible legal challenges these fees should have a clear nexus connecting them to the predicted impacts of the proposed development. The sample nexus described above for impact fees could also apply to development proffers.

Legal Basis – This fee on building permits is considered a "development fee," and is thus supported by A.R.S. § 11-1102.

- **Linkage Fees**

General Information – In certain states such as California and Colorado local governments have assessed linkage fees to offset the impacts of development within their jurisdictions. While similar to development impact fees, linkage fees don't require the quantification of a development's impact, and thus may not fulfill the "rough proportionality" requirement generally needed for impact fees. In the past these fees have been assessed to assist in the provision of services such as daycare and affordable housing, and are one of the newest forms of exactions. Linkage fees have mainly been used in extremely competitive housing and commercial markets, and are often seen as a cost of doing business by developers during times of rapid development. However, in the event of a market decline, developers are less likely to pay these fees and this funding mechanism may be legally challenged.

Legal Basis – Since these funds have not yet been legally challenged it's not yet known if they will stand up to judicial scrutiny.

- **Parking Garage Revenues**

General Information – The Toledo/Lucas County Trust Fund in Ohio is one fund that uses parking garage revenues to provide affordable housing. In Pima County, these revenues are considered Enterprise Funds, and are kept separate from General Funds. This account monitors the management and operation of eight parking facilities in downtown Tucson (6 garages and 2 lots), and during fiscal year 2007 generated \$41,000 in income. These funds can be appropriated during the standard budgetary process.

- **General Funds**

General Information – While A.R.S. § 11-381 enables counties to establish and fund a Housing Trust Fund, it doesn't create additional funding sources. As such, County General Funds can serve as a valuable temporary or supplementary revenue source. These funds are a more feasible source during times of budgetary surplus, but since they aren't dedicated to the Trust Fund they are often diverted for other needed activities. These funds can be appropriated during the standard budgetary process, through the budget memo from the County Administrator.

- **Interest income**

General Information – Substantial amounts of interest income are generated by the General Fund - over \$2.3 million in fiscal year 07/08. These funds are then rolled into the General Fund, and can be earmarked through the County budgetary process.

- **Food & Beverage Tax**

General Information – This would be a special tax on food and beverages purchased at restaurants. Dade County, Florida has this type of tax for higher-end restaurants, with the proceeds going towards a fund to aid the homeless. There is no State Statute specifically enabling counties to tax food and drinks at restaurants, so the State Legislature would need to enact such a law.

- **County Use Tax on Electricity**

General Information - Under A.R.S. 42-6110 counties are allowed to tax electricity purchased from an electricity supplier and must use these revenues to support and enhance countywide services. With a unanimous vote by the Board of Supervisors, Pima County could adopt such a tax to raise money for the Trust Fund. State Statute requires that these revenues be used to “support and enhance countywide services.”

While this tax can be assessed for both residential and commercial customers, care should be taken when applying these rates to residential customers. This tax has the potential to be regressive, as an increased electrical bill would harm the same low- to moderate-income families that will be served by the Trust Fund. Also, lower-priced homes may be less energy efficient than more expensive ones, further impacting the intended beneficiaries of the housing trust fund.

- **State Matching Funds**

General Information - Several local trust funds in other states have utilized state matching funds from State Housing Trust Funds. Although the Arizona Housing Fund currently has no funding for the rest of the year, Pima County has received funds from this source in the past.

- **Demolition Fees**

General Information - In older urban areas experiencing substantial redevelopment, local governments have collected demolition fees to provide income for their housing funds, however in Arizona the abundance of cheap, undeveloped land makes this a less promising strategy. Assessing such a fee would discourage redevelopment by increasing the cost of redevelopment and making undeveloped land more attractive. This would contribute to sprawl, which comes with its own set of problems.

APPENDIX 1

There are 19 charter cities in Arizona

AVONDALE
BISBEE
CASA GRANDE
CHANDLER
DOUGLAS
FLAGSTAFF
GLENDALE

GOODYEAR
HOLBROOK
MESA
NOGALES
PEORIA
PHOENIX
PRESCOTT

SCOTTSDALE
TEMPE
TUCSON
WINSLOW
YUMA

Plus one city that operates under a TERRITORIAL (pre-statehood) charter...
Tombstone

Briefing Report Number 2



**Recommendations on
Local and Regional Trust Funds**

**2008 GOVERNOR'S
HOUSING FORUM
Flagstaff, Arizona
September 10, 2008**

LISC
Phoenix
Local Initiatives
Support Corporation

Housing Trust Fund Research

Summary of legal analysis

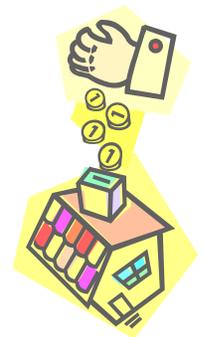
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Florin Ivan ▪ Fenlene Hsu



SANDRA DAY O'CONNOR COLLEGE OF LAW
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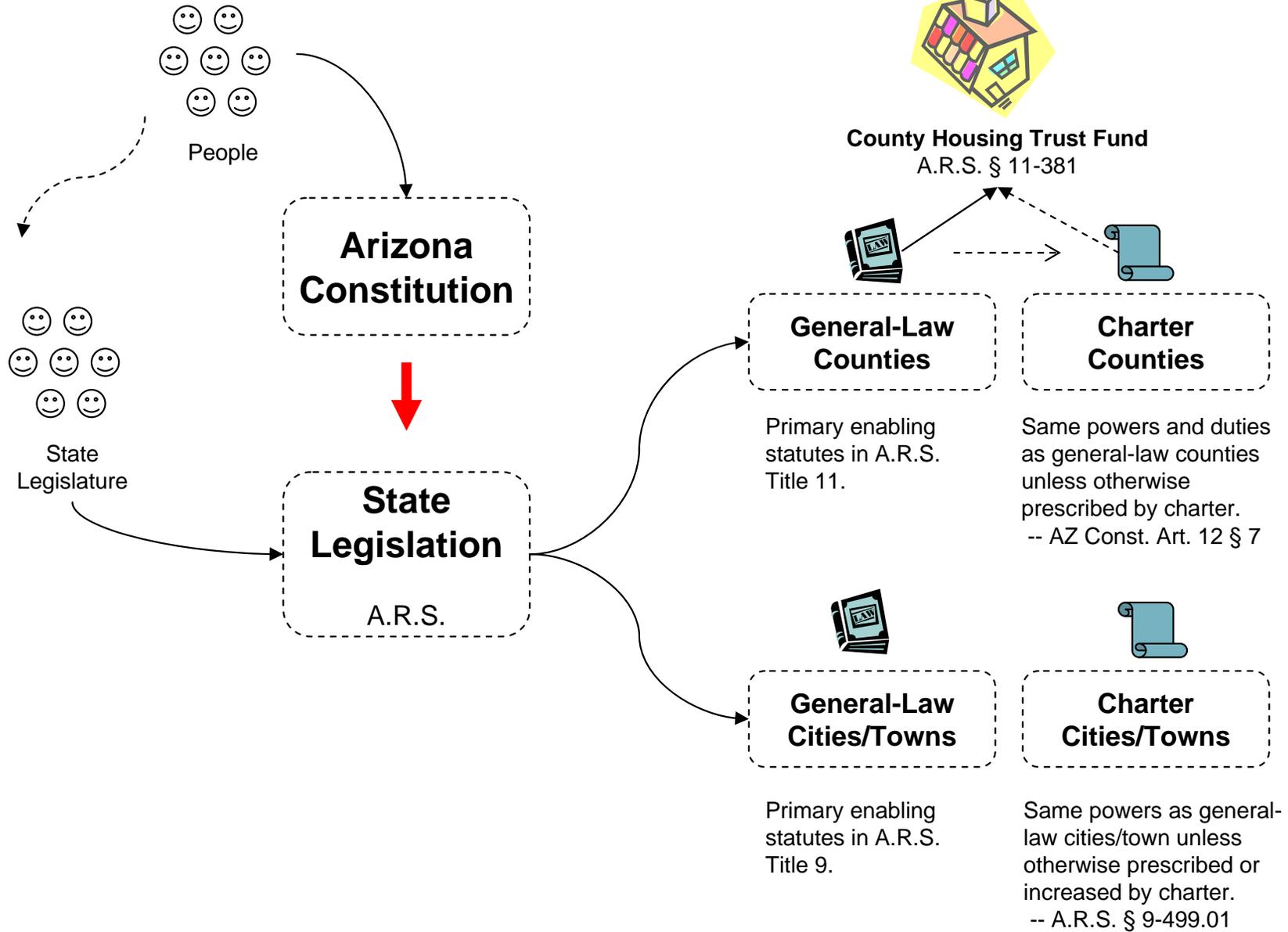
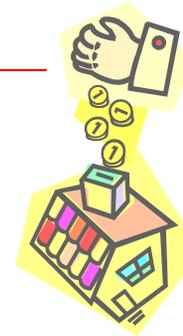


! DISCLAIMER !

- * Florin Ivan and Fenlene Hsu are law students, and are not licensed to practice law in the state of Arizona.
- * Our research represents a preliminary investigation into the legal viability of several funding sources for the Housing Trust Fund. The research and resulting deliverables do NOT constitute authoritative legal opinion or advice.
- * The body of law researched are Arizona statutes and published appellate decisions effective March 14, 2008. The following jurisdictions were researched, as they are controlling for Arizona: Arizona state courts, Arizona federal district courts, Court of Appeals for the Ninth Circuit, and the United States Supreme Court. Any statutes or case law that become effective after March 14, 2008 (or are published post-March 14th and are effective retroactively) are outside the research scope.
- * The statements and conclusions presented are the personal views of Fenlene Hsu and Florin Ivan, and do not represent the views of Arizona State University or the O'Connor College of Law.
- * Fenlene Hsu and Florin Ivan shall be held harmless for any error, damage, or negative consequences resulting from our statements, comments or other written and oral communication.



Enabling Legislation – High-level Summary





Charter Cities

- * **A.R.S. Title 9 does *not* contain enabling legislation for setting up a city-level “housing trust fund” (for general-law cities/towns)**

- * **Charter cities *may* set up city-level “housing trust funds” IF the city charter contains enabling legislation**

Example

Tucson City Charter, Chapter 4 § 1(10). *Care of sick and helpless, etc.*
To provide for the care of the sick and *helpless*, and to make regulations to prevent the spread of diseases.

Article XXI § 10A-220 et seq. Tucson Housing Trust Fund Advisory Committee (THTFAC).



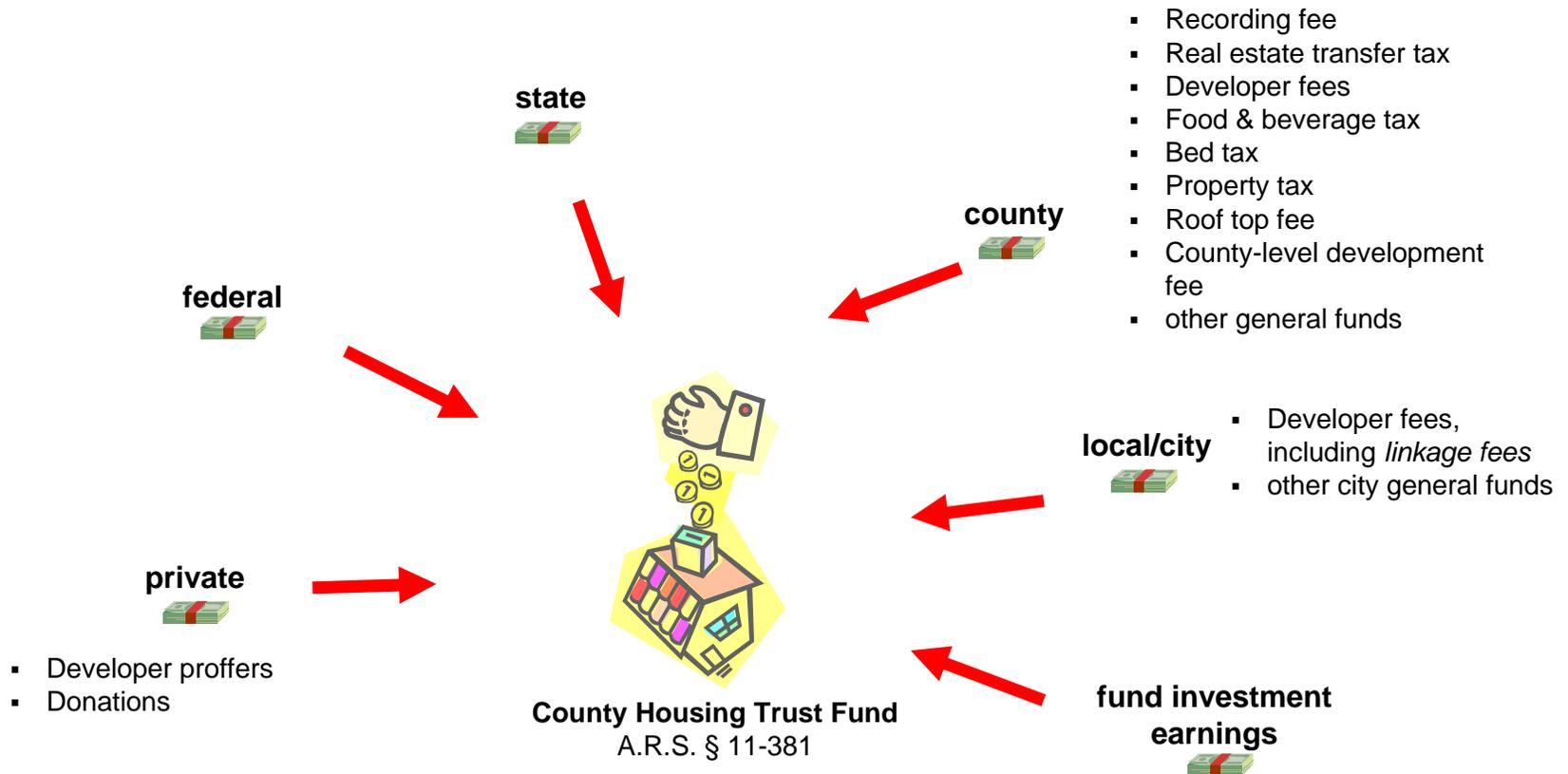
50,000-ft. View of Funding Sources

Tax

Tax revenue need not directly benefit the specific activities of the individuals who pay the tax. Legislation for a specific tax might limit activities which the tax can subsidize.

Fee

Typically used to provide a direct present benefit--or a good-faith direct future benefit--to the entities who pay the fee. Hence, a municipality's use of a fee is not completely discretionary.





What is the Nexus Issue?

“In order for a ‘fee’ to withstand legal scrutiny, there must be a **nexus** (or *reasonable relationship*) between the use of fee revenue and the underlying activity that is subjected to the fee. Otherwise, the fee may be found to violate either state law or the US Constitution.

In Arizona, fees are presumed valid unless the party challenging the fee proves a weak or absent nexus.”
Research Results, p. 4

Flagstaff has completed a Nexus study



Next Steps

- * Decide the top 3 funding sources to pursue

- * Analyze each as to:
 - Revenue potential (amount that can be used for htf)
 - Steps required to enact the tax or fee
 - What % tax to assess?
 - Who or what will tax be assessed against?
 - Who will collect the tax?
 - How to direct funds to htf?
 - What ordinances need to be passed to make this happen?
 - Who must pass the ordinance?
 - How much will it cost to administer the program?

- * Establish timeline for implementing funding sources



Wrap-up, Q & A

For advice on specific legal questions, please consult your jurisdiction's own legal counsel.

For suggestions on additional areas of research, please send to:

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Thank You!