KRIS MAYES
ATTORNEY GENERAL

OFFICE OF THE ARIZONA ATTORNEY GENERAL

January 19, 2023

Via Email

Hon. Ben Toma
Speaker of the Arizona House of Representatives
1700 West Washington
Room 223
Phoenix, AZ 85007

Re: S.B. 1487 Investigation No. 22-002

Dear Speaker Toma:

The Attorney General's Office has received your letter dated January 17, 2023, regarding Tucson's Source of Income ordinance, Ordinance No. 11959 and our office's associated investigation. I appreciate your views on this matter and wanted to take the opportunity to respond.

As you know, on December 21, 2022, the Attorney General's Office issued Investigative Report No. 22-002, which found that Tucson's Source of Income ordinance violates state law. Under A.R.S. § 41–194.01(B)(1), this gave Tucson thirty days to "resolve the violation," or else my office would be required to notify the state treasurer, who would then withhold state shared monies from Tucson.

On January 11, 2023, Tucson's Mayor and Council approved a motion to, among other things, "suspend enforcement of the City's Source of Income ordinance during the time frame that Attorney General Mayes might need to reconsider the determination relating to the Ordinance, and to eliminate the potential conflict with Arizona law as cited in the prior determination." On January 13, 2023, Tucson sent a letter informing me of the suspension of the ordinance. My office subsequently spoke with Tucson's City Attorney and obtained assurances, confirmed in writing, that the City will not (1) resume any enforcement of the ordinance while Investigative Report No. 22-002 remains operative; or (2) resume any enforcement without providing prior notice to the Attorney General's Office. After reviewing the concerns expressed in your January 17 letter, we also sought and received written confirmation that the City will not engage in any retroactive enforcement (i.e., if the Source of Income ordinance is later readopted or un-suspended, the City will not take enforcement actions based on conduct that occurred while enforcement of the ordinance was suspended).

The resulting legal question is whether Tucson's suspension of the ordinance and related assurances temporarily "resolve[s] the violation" found by Investigative Report No. 22-002 within the meaning of § 41–194.01(B)(1). Having reviewed the relevant authorities, the Attorney General's Office concludes that Tucson's actions do resolve the violation, at least for the time being.

First, § 41–194.01(B)(1)'s language is broad enough to allow for remedial measures other than repealing the offending city law. Subsection B(1), in relevant part, requires the AG to inform the violating city that it has 30 days "to resolve the violation," and to take further action if the city "fail[s] to resolve the violation" within that timeframe, including monitoring the city's remedial response until "the offending" law "is repealed *or* the violation is *otherwise* resolved[.]" A.R.S. § 41–194.01(B)(1) (emphasis added). The italicized language makes clear that a city does not have to repeal the offending law in order "to resolve the violation" within the 30-day timeframe.

The pertinent question then becomes what besides a repeal is sufficient to resolve a violation. Since Title 41 does not appear to define "resolve," we consider the word's common and approved meanings. The most common meaning is "to deal with successfully" or "to find an answer to." "Resolve," Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/resolve; *see also* "Resolve," Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/resolve ("[T]o solve or end a problem or difficulty."). Considering these definitions and the statutory language here, we conclude that Tucson has resolved the violation, at least for the time being.

Second, *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588 (2017), and *State ex rel. Brnovich v. City of Phoenix*, 249 Ariz. 239 (2020), provide insight into what the Arizona Supreme Court and the Attorney General's Office have previously considered acceptable to temporarily avoid a violation of state law for purposes of § 41–194.01(B)(2). In turn, these cases inform what it means to resolve a violation for purposes of § 41–194.01(B)(1).

At issue in *City of Tucson* were laws related to firearms, the constitutionality of which the Attorney General's Office investigated under § 41–194.01 and which the Attorney General's Office found had possibly violated state law. Tucson "refused to repeal or otherwise change" the offending law, and instead "suspend[ed] the implementation" of it "until the issue [was] adjudicated." 242 Ariz. at 592, ¶ 10. In the subsequent special action brought pursuant to § 41–194.01(B)(2)—not (B)(1)—the Court discussed, among other things: (1) § 41–194.01's "apparent" legislative objective, explaining it was "to require and incentivize political subdivisions to comply with state law," *id.* at 593, ¶ 16; and (2) subsection (B)(2)'s mandatory bond requirement and whether Tucson had to pay it in light of the city's voluntary "agreement to cease the violating action," *id.* at 596–97, ¶¶ 32–34. Although the Court did not explicitly decide the latter question, the Attorney General's position was that Tucson did not have to pay the bond because the city's voluntary suspension and enforcement of the offending law already ensured that the city was not violating state law while receiving state money, assuming the purpose for paying the bond was to ensure Tucson would not receive state money while possibly violating state law. *See id.* at 597, ¶ 34.

City of Phoenix is similar to *City of Tucson* in that it involved a special action brought under (B)(2), not (B)(1), for a city law that possibly violated state law (Phoenix's "trip fees" for airport transportation). 249 Ariz. at 241, ¶ 1. The Attorney General and City of Phoenix stipulated to stay

enforcement of the city law pending the special action's outcome, and additionally agreed that the city did not have to pay the mandatory bond under (B)(2). *Id.* at 243, 247, ¶¶ 15, 33. One of the questions presented was whether the mandatory bond provision was nevertheless enforceable. *Id.* at 247–48, ¶¶ 32–37. The Attorney General "assert[ed] that [ ] staying implementation of the challenged law fulfills [the bond's] purpose" and so argued that the Court "should interpret the bond requirement as applying only in the absence of a stay." *Id.* at 247, ¶ 34. Ultimately, the Court refused to adopt the Attorney General's argument, but only because the Court concluded that the bond's purpose and intent could not be deciphered from the statute's "incomplete and unintelligible" language. *Id.* at 248, ¶ 37.

Following the logic in both *City of Phoenix* and *City of Tucson*, Tucson's actions are sufficient to resolve the violation because the suspension ensures that Tucson is not violating the law while receiving state money. *See* A.R.S. § 41–194.01(B)(1) (requiring the AG to notify the state treasurer to withhold state shared money from local entity upon finding a violation, and to notify the state treasurer to restore distribution of state shared money upon finding that the offending ordinance was repealed or "the violation [ ] otherwise resolved").

Accordingly, the Attorney General's Office has determined that the City of Tucson has, at least for the time being, resolved the violation found in Investigative Report No. 22-002 within the 30-day time period set forth in A.R.S. § 41–194.01(B)(1). Thus, at the present time there is no violation for the Attorney General's Office to report to the state treasurer pursuant to A.R.S. § 41–1491.01(B)(1)(a).

The next question raised by your letter is whether the Attorney General has the authority to reconsider an opinion issued pursuant to § 41–194.01. In considering this issue, we look to precedent from our state's appellate courts and previous Attorney General Opinions.

Once again, *City of Tucson* is instructive. There, our Supreme Court rejected a separation of powers challenge to part of § 41–194.01. In doing so, the Court held that Attorney General determinations pursuant to § 41–194.01 do not constitute the exercise of "a judicial function." *City of Tucson*, 242 Ariz. at 594, ¶ 19. "Rather, such determinations are legal opinions, which the Attorney General routinely and permissibly issues in other contexts." *Id.* (citing A.R.S. § 41–193(A)(7)).

Accordingly, in considering whether the Attorney General may reconsider an opinion issued pursuant to § 41–194.01, we look to whether the Attorney General may reconsider an opinion issued pursuant to § 41–193(A)(7). The answer is clearly yes: both the courts and Attorney General have stated that the Attorney General may reconsider such opinions. *See Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 466 ¶ 19 (App. 2007) ("the Attorney General may choose to withdraw an opinion"); Ariz. Op. Att'y Gen. I88-73 (1988) (withdrawing a previous Attorney General Opinion because it had "erroneously relied upon two earlier Attorney General opinions which had incorrectly interpreted art. VII, § 15 of the Arizona Constitution") (internal citations omitted); Ariz. Op. Att'y Gen. I77-158-A (Aug. 16, 1977) ("I am withdrawing my letter opinion 77-158 dated August 15, 1977 and substituting this one in place of it. This action is being taken because the paraphrasing of the statute in that letter could have resulted in its misconstruction.").

This makes sense. If an Attorney General Opinion made a mistake of fact or law, or is superseded by subsequent changes in the law, the Attorney General should correct the Opinion. And

notably, the Attorney General's authority to reconsider an opinion does not derive from an explicit statutory provision, *see* A.R.S. § 41–193(A)(7); rather, it is implicit in the statutory authority to issue an opinion, in both sections 41–193(A)(7) and 41–194.01. *See also City of Tucson*, 242 Ariz. at 593, ¶ 15 ("The Attorney General retains his discretion to apply independent legal analysis and judgment when opining whether a municipal action violates state law.")

The Attorney General's Office has therefore concluded that we have the legal authority to reconsider the findings in Investigative Report No. 22-002.[1] We will perform this review promptly, as § 41–194.01 contemplates. If there are any other points you would like us to consider, we will carefully review them. If there are any issues you would like to discuss, please do not hesitate to contact me or my Solicitor General, Josh Bendor.

Let me close by saying that, while we may disagree in good faith regarding some of the legal issues discussed above, there will be many issues on which we will agree and on which I believe we will be able to work together on behalf of the State of Arizona and its people. I look forward to that partnership.

Sincerely,

Kris Mayes
Attorney General

cc: Linley Wilson
Mike Rankin

[1] We reach this conclusion in a context where reconsideration is being considered during the operation of the statutory cure period. We need not reach the question of whether an Attorney General may reconsider an opinion issued pursuant to § 41–194.01 after the cure period has elapsed, or what consequences would result from such a reconsideration.