

**To: The Honorable Ruth Solomon, The Honorable  
Laura Knaperek - Arizona State Senate House of  
Representatives, The Honorable Andy Nichols -  
Arizona State Senate**

**March 6, 2001**

**Re: Proposition 204  
I01-008 (R00-072/R00-084/R01-004)**

### **Questions Presented**

You have asked the following questions regarding the recently enacted Proposition 204:

1. Before the voters approved Proposition 204, the Legislature had appropriated some of the monies from the tobacco litigation master settlement agreement entered into November 23, 1998 ("tobacco settlement monies"). What is the impact of Proposition 204 on those prior appropriations and must all expenditures of tobacco settlement monies in future fiscal years comply with Proposition 204?
2. Are unexpended tobacco settlement monies the State received before approval of Proposition 204 included in the Tobacco Litigation Settlement Fund ("Fund")?
3. Under Proposition 204, the director of the Arizona Health Care Cost Containment System ("AHCCCS") administers the Fund. May the AHCCCS director withhold payments for the public health programs specified in Arizona Revised Statutes ("A.R.S.") § 36-2901.02(B)(2) if there are monies in the Fund for that fiscal year?
4. Proposition 204 requires the Joint Legislative Budget Committee ("JLBC") annually to compute inflation adjustments for the public health programs funded by the proposition. Because the programs in A.R.S. § 36-2901.02(B)(2) were originally enacted in a 1996 initiative, should the inflation calculation include inflation since 1996, or should the calculation include inflation beginning in fiscal year ("FY") 2000-01?
5. For FY 2000-01, should the amount of funding for the public health programs addressed by Proposition 204 be prorated based on the date on which the initiative was certified by the Governor, or should the funding be equal to the full annual amount?
6. May AHCCCS and other agencies use monies from the Fund to supplant other expenditures?

### **Summary Answers**

1. All future expenditures of tobacco settlement monies must comply with Proposition 204. Consistent with Proposition 204, prior legislative appropriations for future fiscal years may be funded only if the programs specified in Proposition 204 have been fully funded.
2. Proposition 204 requires that all tobacco settlement monies the State receives

be deposited into the Fund. All settlement proceeds not expended before the enactment of Proposition 204 must be deposited into the Fund.

3. If monies remain in the Fund for a fiscal year after the AHCCCS expansion mandated by Proposition 204 has been fully funded, the AHCCCS director must use the remaining monies for the programs specified in A.R.S. § 36-2901.02(B)(2).

4. The funding levels for the programs established by the 1996 initiative must be adjusted for inflation every year since 1996, as required by A.R.S. § 5-522(E).

5. Under Proposition 204, the programs that receive Fund monies are eligible for full funding in the current fiscal year, which began July 1, 2000 and ends June 30, 2001.

6. Agencies must use Fund monies as mandated by Proposition 204. Under Proposition 204, Fund monies shall not supplant other AHCCCS appropriations.

### **Background**

Proposition 204, which Arizona voters approved at the 2000 general election, expands eligibility for AHCCCS and allocates the tobacco settlement monies the State receives.<sup>(2)</sup> A.R.S.

§§ 36-2901.01(A); -2901.02(A). Proposition 204, referred to by its proponents as "Healthy Arizona 2," uses tobacco settlement monies to fund programs that voters approved in a similar 1996 initiative, which was referred to as "Healthy Arizona" (the "1996 Initiative"). See Ariz. Secretary of State, Ballot Propositions & Judicial Performance Review For The November 7, 2000 General Election, 161-64 (argument supporting Proposition 204).

Proposition 204 expands AHCCCS eligibility to cover individuals with income levels of up to 100% of the federal poverty guidelines. A.R.S. § 36-2901.01(A) (as amended by Prop. 204).<sup>(3)</sup> Proposition 204 also created the Fund, which contains all tobacco settlement monies the State receives. A.R.S. § 36-2901.02(A). Arizona's share of the tobacco settlement is estimated at \$3.2 billion, payable in yearly installments over the next 25 years. Ariz. Secretary of State, Ballot Propositions & Judicial Performance Review for the November 7, 2000 General Election at 160.

The AHCCCS director administers the Fund, A.R.S. § 36-2901.02(A), and must use the Fund monies first "to fully implement and fully fund the programs and services required as a result of" the AHCCCS expansion, and then to "fund each of the programs listed in section 5-522 subsection E, as amended pursuant to the initiative measure approved by the voters on November 5, 1996." A.R.S. § 36-2901.02(B)(1), (2). The programs listed in A.R.S. § 5-222(E), and the funding levels specified by statute are:

. \$5 million to the Arizona Department of Economic Security for the Healthy Families Program, which provides services to prevent child abuse and neglect and

to promote child development;

. \$4 million to the Arizona Board of Regents for the Arizona Health Education System to provide scholarships to medical students who agree to practice in the areas of the State that are currently underserved by health care professionals;

. \$3 million to the Arizona Department of Health Services ("DHS") for programs to prevent teenage pregnancy;

. \$2 million to the disease control research fund established by A.R.S. § 36-274

. \$2 million to DHS for the health start program; and

. \$1 million to DHS for the federal Women, Infants and Children Food Program.

Under the 1996 Initiative, these programs were to be funded by State lottery proceeds, but the lottery revenues have historically been insufficient to fund the programs.

### **Analysis**

#### **A. Prior Legislative Appropriations of Tobacco Settlement Funds for Future Fiscal Years Must Comply with Proposition 204.**

Before the voters approved Proposition 204, the Legislature had appropriated some tobacco settlement monies for various purposes in prior and future fiscal years. The Legislature had appropriated tobacco settlement monies in three separate bills:

. **Health Care Group.** In 1999, the Legislature appropriated \$8 million "from the tobacco settlement fund" to AHCCCS in 2000-01 "and each fiscal year thereafter" for certain reimbursements from health care group plans, which is a program administered by AHCCCS. <sup>(4)</sup> 1999 Ariz. Sess. Laws ch. 313, § 39(B).

. **Budget Stabilization Fund.** In 2000, the Legislature approved an emergency measure funding the demolition, renovation, and construction of the Arizona State Hospital ("ASH"). 2000 Ariz. Sess. Laws ch. 1. That measure appropriated \$20 million in FY 1999-2000 through FY 2002-03 from the interest earnings on the Budget Stabilization Fund for the ASH construction. *Id.* at § 4. It also directed the Treasurer to reimburse the Budget Stabilization Fund for those amounts "from the first \$80,000,000 in up-front tobacco settlement monies received by this State." *Id.* at § 3(B). Those payments were to be made in \$20 million installments from FY 1999-2000 through FY 2002-03.

. **Behavioral Health.** In 2000, the Legislature also appropriated monies "from the tobacco litigation settlement account in the State general fund" to the Serious Mental Illness Service Fund and to DHS, including \$50 million for services for the seriously mentally ill and \$20 million for children's behavioral health. 2000 Ariz. Sess. Laws 5th Sp. Sess. ch. 2, § 5(A), (B). The appropriations were for FY 2000-01 and were exempt from the lapsing requirements of A.R.S. § 35-190.

Proposition 204 did not expressly repeal those prior enactments. In the absence of an express repeal, the issue is whether Proposition 204 impliedly repealed the prior legislative appropriations of tobacco settlement monies. Generally, courts are reluctant to conclude that an enactment impliedly repeals a prior enactment. *Achen-Gardner, Inc. v. Superior Court*, 173 Ariz. 48, 54, 839 P.2d 1093, 1099 (1992). Rather, courts will attempt to harmonize statutes to avoid inconsistencies. Where no reasonable construction can give effect to both statutes, courts find that the later enactment impliedly repealed an earlier enactment. *State ex rel. Larson v. Farley*, 106 Ariz. 119, 122, 471 P.2d 731, 734 (1970).

Proposition 204's requirements cannot be reconciled with prior appropriations that would permit the tobacco settlement monies to be used in a manner inconsistent with Proposition 204 in *future* fiscal years. The language of Proposition 204 sweeps "*all* monies that this State receives" pursuant to the tobacco litigation settlement into the Fund and requires that those monies be used for specifically enumerated purposes. A.R.S. § 36-2901.02 (emphasis added). The Proposition also provides that the Fund "supercedes any tobacco litigation settlement fund previously established by the legislature." Proposition 204 at § 4. Under Proposition 204, the Legislature may appropriate monies that remain in the Fund only after the AHCCCS expansion mandated by the Proposition and the public health programs listed in A.R.S. § 5-522(E) are fully funded, and all such legislative appropriations must be for "programs that benefit the health of the residents of this State." A.R.S. § 36-2901.02(D).<sup>(5)</sup>

The Legislature's prior appropriations for future fiscal years include an \$8 million annual appropriation to AHCCCS for the Health Care Group and a \$20 million appropriation in FY 2001-02 and FY 2002-03 to reimburse the Budget Stabilization Fund for the ASH construction. The appropriation to AHCCCS for the Health Care Group is a program that benefits the "health of the residents of this State" as Proposition 204 requires of legislative appropriations of tobacco settlement monies. *Cf.* A.R.S. § 36-2901.02(D). The ASH construction project is also related to the health of Arizonans, and, therefore, using tobacco settlement monies to reimburse the Budget Stabilization Fund for that project satisfies Proposition 204's requirement that tobacco settlement monies be appropriated for health-related programs. Under Proposition 204, however, legislative appropriations may receive Fund monies only if the AHCCCS expansion and the public health programs listed in A.R.S. § 5-522(E) are first fully funded.<sup>(6)</sup> See A.R.S. § 36-2901.02(D) (legislative appropriation of the Fund). If there are not sufficient monies in the Fund for the programs specified in Proposition 204, those prior appropriations are ineffective in future fiscal years.<sup>(7)</sup>

Proposition 204 does not affect the validity of *past* legislative appropriations for FY 2001 and earlier fiscal years. Because statutory changes generally apply prospectively, Proposition 204 only governs expenditures of tobacco settlement monies after it becomes law. See A.R.S. § 1-244. It does not require that tobacco settlement money that the Legislature had appropriated for FY

2000-01 or earlier fiscal years be collected (assuming that is even possible) and

transferred to the Fund.

**B. Proposition 204 Requires that All Unexpended Tobacco Settlement Monies Be Credited to the Fund.**

The next question is whether the Fund established by Proposition 204 includes unexpended tobacco settlement monies the State received before approval of Proposition 204. This question concerns whether the balance of approximately \$2.3 million that remained in the general fund account when voters approved Proposition 204 should be transferred to the Fund.<sup>(8)</sup>

Section 36-2901.02(A), A.R.S., provides that "[t]he [Fund] is established consisting of *all* monies that this State receives pursuant to the tobacco litigation master settlement agreement entered into on November 23, 1998, and interest earned on these monies." (Emphasis added.) Thus, Proposition 204 created a special fund separate and apart from the State's general fund, and designated the purposes for which monies in the Fund would be used. See A.R.S. § 35-142(A)(8) (monies designated by law as special State funds are not considered a part of the general fund). Proposition 204 further provided that the Fund "supersedes any tobacco litigation settlement fund previously established by the legislature." Proposition 204, § 4(A). This language thus envisions that all tobacco settlement monies will be transferred to the Fund, even if the Legislature had, before the enactment of Proposition 204, created some other fund for the settlement monies.

Proposition 204 could be read to apply only to monies the State receives after Proposition 204 was enacted. This interpretation would be supported by the Proposition's reference to tobacco settlement monies the State "receives," and the principle that statutory changes apply prospectively. That interpretation, however, overlooks the broad mandate that "*all*" tobacco settlement monies the State receives pursuant to the tobacco litigation master settlement agreement entered into on November 23, 1998 and interest earned on those monies be deposited in the Fund. In addition, "a statute is not retroactive in application simply because it may relate to antecedent facts." *Tower Plaza Invs., Ltd. v. DeWitt*, 109 Ariz. 248, 250, 508 P.2d 324, 326 (1973). In this case, the receipt of the tobacco settlement monies is an "antecedent fact" and the future use of such monies is the action prospectively controlled by Proposition 204.

The language of Proposition 204 suggests it is intended to control the future expenditure of tobacco settlement funds, regardless of when the State received those settlement monies. Thus, any balance remaining in the account within the general fund containing tobacco settlement monies should be transferred into the Fund so that it is used as the Proposition mandates.

**C. In Administering the Fund, the AHCCCS Director Must Comply with the Requirements of Proposition 204.**

Your next question concerns whether the AHCCCS director may withhold payment to the public health programs specified in A.R.S. § 36-2901.02(B)(2) if money remains in the Fund in a fiscal year after the AHCCCS expansion has been fully

funded. The AHCCCS director may wish to withhold such monies to ensure that the AHCCCS expansion will be fully funded in future years.

In Proposition 204, Arizona voters appropriated tobacco settlement monies for a particular purpose. *Cf. Rios v. Symington*, 172 Ariz. 3, 833 P.2d 20 (1992) (addressing requirements for appropriations); see also Ariz. Att'y Gen. Op. I91-001 (discussing authority to appropriate through initiatives). Although agency directors must operate programs "in a fiscally responsible fashion," once legislation appropriates funds for a particular purpose, executive agencies must implement the law consistent with those priorities. *Cf. Rios*, 172 Ariz. at 12, 833 P.2d at 29 (Governor's orders that agency revert appropriations were improper).

Here, the AHCCCS director's statutory obligation is to "*use fund monies as follows and in the following order*:"

1. Withdraw an amount necessary *in each fiscal year* to fully implement and fully fund the programs and services required as a result of the expanded definition of an eligible person pursuant to section 36-2901.01.
2. Withdraw an amount necessary *in each fiscal year* to fully implement and fully fund each of the programs listed in section 5-522, subsection E."

A.R.S. § 36-2901.02(B) (emphasis added). This statutory language indicates that the AHCCCS director makes the funding determination for *each fiscal year*. Thus, the AHCCCS director must first ensure that the AHCCCS expansion is fully funded for that fiscal year and then, after the AHCCCS component is fully funded for that year, must withdraw monies from the Fund for the public health programs listed in A.R.S. § 5-522(E).

#### **D. The Funding Levels for the Programs Listed in A.R.S. § 5-522(E) Must Be Adjusted for Inflation Every Year Since 1996.**

We next address whether the inflation calculation required by Proposition 204 for the funding levels for the enumerated public health programs must include inflation since 1996, or whether such funding should include inflation beginning in FY 2000-01.

Proposition 204 requires that, after fully funding the expanded AHCCCS eligibility, the AHCCCS director is to use monies in the Fund to "fully fund" the programs "listed in [A.R.S. § 5-522(E)] as amended pursuant to the initiative measure approved by the voters on November 5, 1996, *at funding levels that when annually adjusted for inflation, as provided in said initiative, are equal to or greater than those provided for in that election.*" A.R.S. § 36-2901.02(B)(2) (emphasis added). The clear language of Proposition 204 indicates that the funding levels for the public health programs listed in A.R.S. § 5-522(E) must be adjusted for inflation "*as provided in [the 1996 Initiative].*" Section 5-522(E) expressly provides that "[t]he allocations in this subsection shall be adjusted annually according to changes in the GDP price deflator as defined in § 41-563."<sup>(9)</sup> Thus, although the programs never received funding from the State lottery, those funding levels were

nonetheless required to be adjusted each year after the voters approved the statutory amendment in the 1996 Initiative. Proposition 204 explicitly recognizes those adjustments and indicates that monies from the Fund for these programs must equal or exceed the adjusted statutory levels.

**E. Proposition 204 Requires that the Programs Listed in A.R.S. § 5-522(E) Be Funded for FY 2000-01 in Its Entirety.**

A related question concerns whether for FY 2000-01, the amount of funding for the public health programs addressed by Proposition 204 should be prorated based on the date when the initiative was certified by the Governor, or whether the funding should be equal to the full annual amount specified by statute.

Section 36-2901.02(B)(2), A.R.S., requires the director of AHCCCS to "[w]ithdraw an amount necessary in each fiscal year to fully implement and fully fund each of the programs listed in Section 5-522." The plain language of Proposition 204, when read together with § 5-522(E), requires the Legislature to transfer an amount equal to or greater than the amounts listed in A.R.S. § 5-522(E) in each fiscal year, including FY 2000-01. There is nothing in the language of A.R.S. § 36-2901.02(B)(2) to suggest that the funding levels be prorated for FY 2000-01.

**F. Agencies Must Use Monies from the Fund as Directed by Proposition 204.**

The final issue is whether the AHCCCS director and other agency directors who receive monies from the Fund may use that money to "supplant existing expenditures."

Proposition 204 states that monies in the Fund "shall be used to supplement and not supplant existing and future appropriations to [AHCCCS] for existing and future programs." A.R.S. § 36-2901.02(E)(1). Thus, under the plain statutory language, the AHCCCS director cannot use Fund monies to "supplant" existing monies. AHCCCS must use the Fund monies it receives for the expanded AHCCCS eligibility authorized by Proposition 204. See A.R.S. § 36-2901.02(B)(1) (AHCCCS must use the Fund monies for "the programs and services required as a result of the expanded definition of an eligible person, . . . [for AHCCCS]").

No similar "anti-supplanting" language governs the monies the AHCCCS director distributes to other agencies for the programs in A.R.S. § 5-522(E). Although not subject to the prohibition against supplanting, those agencies are obligated to use those Fund monies for the purposes designated in the Proposition. See A.R.S. § 37-2901.02(B)(2).

This Opinion does not determine whether a specific expenditure complies with the requirements in Proposition 204. Such a determination requires a fact specific evaluation of the particular expenditure.

**Conclusion**

Proposition 204 controls the future uses of tobacco settlement monies the State receives. It applies to any tobacco settlement monies in the general fund at the

time voters approved the Proposition and any tobacco settlement monies the State subsequently receives. Agencies must use the monies as mandated by the Proposition. In addition, prior legislative appropriations for future fiscal years are effective only to the extent they comply with the requirements of Proposition 204. Under Proposition 204, the funding levels for the programs set forth in A.R.S. § 5-522(E) must be adjusted to take into account inflation since 1996, and those programs are entitled to full funding in the current fiscal year (2000-01) provided that sufficient monies remain in the Fund after fully funding the AHCCCS expansion.

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Janet Napolitano  
Attorney General

1. This Office received an opinion request from Senator Solomon and Representative Knaperek concerning Proposition 204, as well as opinion requests from Senator Nichols. Because the opinion requests raise related issues, they are addressed in a single Opinion.
2. Another proposition on the 2000 general election ballot, Proposition 200, also proposed to allocate tobacco settlement proceeds. Although the voters also approved Proposition 200, that measure received fewer votes than Proposition 204. *See* Secretary of State, Official Canvass, 2000 General Election. Proposition 200 expressly provided that, except for a section relating to the tobacco tax, its provisions would not become effective if another measure allocating more than 80% of the tobacco settlement money received more votes than Proposition 200. Proposition 200, § 30. Because Proposition 204 allocates more than 80% of the tobacco settlement proceeds and it received more votes than Proposition 200, Proposition 204 controls the disposition of tobacco settlement proceeds. *Id.*; *see also* Ariz. Const. art. IV, pt. 1, § 1 (12) (if voters approve conflicting ballot measures, the measure that receives more votes takes effect).
3. The 1996 Initiative also included a provision that expanded AHCCCS eligibility to 100% of federal poverty, but that change was effective only if the State obtained a federal waiver for the program. A.R.S. § 36-2901.01 (as added by 1996 Initiative). Because the State never received such a waiver, the change approved in 1996 never took effect. The AHCCCS expansion in Proposition 204 had no conditional enactment. After the voters approved Proposition 204, the State received a federal waiver, which will provide some federal monies for the AHCCCS expansion.
4. Prior to Proposition 204, the tobacco settlement monies were separately accounted for as part of the State's general fund.
5. Moreover, the State Constitution restricts the Legislature's ability to enact legislation that uses tobacco settlement monies for purposes other than those designated in Proposition 204. *Cf.* Ariz. Const. art. IV, pt. 1, §1(6), (14) (amendments from Proposition 105, approved by voters in 1998).
6. These prior appropriations of tobacco settlement monies were not technically appropriations from the Fund because the Fund did not exist when the Legislature made those appropriations. However, because Proposition 204 supercedes any prior tobacco settlement fund, prior appropriations of tobacco settlement monies should be regarded as appropriations from the Fund.
7. Because the appropriation for ASH construction was made from interest on the Budget Stabilization Fund, and not from the tobacco litigation settlement fund, the construction appropriation is not affected by this Opinion. It is the *repayment* of monies to the Budget Stabilization Fund from the tobacco litigation settlement fund that may be ineffective in any fiscal year in which no monies remain following payment for AHCCCS expansion and the programs listed in A.R.S. § 5-522(E).
8. Before the voters approved Proposition 204, the State had received a single tobacco settlement payment of approximately \$120 million. A balance of approximately \$2.3 million remains after the legislative appropriations through FY 2001 were deducted.
9. The GDP price deflator is an average of the four implicit price deflators for the gross domestic product reported by the



United States Department of Commerce for the four quarters of the calendar year. A.R.S. § 41-563(E)(2).

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