

**Melvin Young, Vice-Chairperson**  
**Arizona Board of Appraisal**

**May 14, 1999**  
**No. I99-012 (R99-014)**

### **Question Presented**

The Arizona Board of Appraisal ("Board") has asked whether (i) the recent appointment to the Board of a third member of the Appraisal Institute is authorized by Arizona Revised Statutes Annotated ("A.R.S.") § 32-3604(D) and, (ii) if the appointment is not authorized, what actions the Board should take to avoid potential challenges to the decisions in which the appointee participated?

### **Summary Answer**

The Board's enabling legislation prohibits "more than two persons from the same professional appraisal organization or association" from serving on the Board concurrently. A.R.S. § 32-3604(D). Although the Appraisal Institute has multiple chapters throughout Arizona, members of the Appraisal Institute belong to the "same professional appraisal organization or association." Accordingly, the appointment to the Board of a third member of the Appraisal Institute is inconsistent with A.R.S. § 32-3604 (D). Notwithstanding the inconsistency, Arizona courts have held that the acts of *de facto* officers are valid. This common law principle should shield the decisions of the Board if challenged for noncompliance with A.R.S. § 32-3604 (D). The Board, however, may also wish to ratify its decisions in an abundance of caution.

### **Background**

Congress enacted the Financial Institution Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") as a result of the crisis in the savings and loan industry and the concurrent threat to the federal deposit insurance fund. Public Law 101-73, § 101, 103 Stat. 183, 187. In FIRREA, Congress enlisted both federal and state law to respond to the problems it identified and mandated that the States promulgate appraisal licensing and certifying systems consistent with FIRREA. *See* 12 U.S.C. §§ 3346 through 3348. The federal body that monitors State appraiser certifying licensing agencies to ensure compliance with FIRREA is the Appraisal Subcommittee of Federal Financial Institutions Examination Council ("Appraisal Subcommittee"). Public Law 101-73, § 1103, 103 Stat. 183, 512. The Appraisal Subcommittee was established to "provide that Federal financial and public policy interests in real estate transactions will be protected by requiring that real estate appraisals utilized in connection with federally related transactions are performed in writing, in accordance with uniform standards, by individuals whose competency has been demonstrated and whose professional conduct will be subject to effective supervision." 12. U.S.C. § 3331.

In 1990, the Arizona Legislature established the Board of Appraisal to implement FIRREA. 1990 Ariz. Sess. Laws ch. 313, § 1. The Board has nine members: four State certified or licensed appraisers, four public members, and a registered property tax agent. A.R.S. § 32-3604 (B). Section 32-3604, A.R.S.,

contains multiple limitations on the qualifications of Board members. *See, e.g.*, A.R.S. § 32-3604 (B) (2) (prohibits public members from being "related within the third degree of consanguinity or affinity to any real estate appraiser"); 32-3604 (E) (restricts public members from being "engaged in the practice of appraising or be[ing] the owner or employee of any proprietary business involving appraisal education or testing of appraisers"). One of those limitations is found in subsection D, which provides, in part: "Not more than two persons from the same professional appraisal organization or association may serve on the board concurrently."

You have indicated that the Board's most recent appointee is a member of the Appraisal Institute-Phoenix Chapter, and that the Board's current membership includes two members of the Appraisal Institute, a property tax agent and a certified general appraiser, who are members of the Phoenix and Tucson Chapters, respectively.

### Analysis

#### **A. The Newest Board Appointment Is Inconsistent With A.R.S. § 32-3604(D).**

The issue of whether the recent Board appointment complies with A.R.S. § 32-3604 (D) depends on whether the new appointee belongs to the same professional association or organization as the two current Board members. Standard principles of statutory construction lead to the conclusion that the newest appointment is inconsistent with A.R.S. § 32-3604 (D). <sup>(1)</sup>

One of the fundamental goals of statutory interpretation is to implement the Legislature's intent. *Canon Sch. Dist. v. W.E.S. Constr. Co.*, 177 Ariz. 526, 529, 869 P.2d 500, 503 (1994). In interpreting a statute, the plain and natural meaning of the language is followed to discover that intent. *State v. Arthur*, 125 Ariz. 153, 155, 608 P.2d 90, 92 (App. 1980). Where legislative language is plain and unambiguous, the statutory text is applied as written. *See Mid Kansas Fed. Sav. & Loan Ass'n v. Dynamic Dev. Corp.*, 167 Ariz. 122, 128, 804 P.2d 1310, 1316 (1991).

Here, A.R.S. § 32-3604 (D) directly precludes more than two persons from the same professional appraisal organization or association from serving on the Board concurrently. The terms "organization" or "association" are not defined in statute. When a term is not specifically defined by statute, it is given its ordinary meaning. A.R.S. § 1-213; *Harrelson v. Industrial Comm'n*, 144 Ariz. 369, 374, 697 P.2d 1119, 1124 (App. 1984). An "association" is "an organization of persons having a common interest." Webster's Third New International Dictionary 132 (1993). "Organization" means "a group of people that has a more or less constant membership." *Id.* at 1590. The Appraisal Institute meets both definitions. The Appraisal Institute was organized to set and enforce membership and ethics standards, to maintain educational standards, to promote research and appraisal related information, and to work on legislative and regulatory matters. Appraisal Institute Bylaws art. II, § 1 (1998). The Appraisal Institute is governed by a national Board of Directors with final authority over all matters relating to the Institute. *Id.* at art. X, § 1

(1998). The Bylaws authorize the Board of Directors to establish chapters of the Appraisal Institute that are subject to the control of the national organization. *Id.* at art. XVI; *see also*, Appraisal Institute Model Chapter Bylaws art. II. The Appraisal Institute and its committees establish criteria for membership and determine admission of each member to the organization. Appraisal Institute Regulations 1, 2, 4, and 7. The Appraisal Institute, its staff, and committees receive and process all disciplinary complaints, conduct investigations, and determine sanctions. *Id.* at 4, 6, and 7. The Appraisal Institute regulations govern all chapter functions including dues, fees, elections, meetings, committees, and revocation of chapter charters. Appraisal Institute Bylaws art. XVI, §§ 3 and 4. The Institute also controls all financial operations and assets of its chapters. Appraisal Institute Bylaws art. XVI, § 1 ("[e]ach Chapter shall exist solely by reason of the charter granted to it by the Appraisal Institute and shall hold all its property and assets in trust for the Appraisal Institute"). Under Regulation 8, the national Appraisal Institute invoices national and chapter dues to its members (remitting chapter dues to the local chapter) and prohibits chapters from charging dues other than those authorized by the national Board of Directors or national Executive Committee. Appraisal Institute Regulation 8, art. VIII, §§ 2 and 7. According to the same Regulation, membership in a chapter automatically terminates if the individual ceases to be a member of the Appraisal Institute. *Id.* In summary, the Bylaws, Model Chapter Bylaws, and Regulations of the Appraisal Institute reflect that (i) those who hold membership in the Appraisal Institute belong to the national organization and individual chapters, (ii) the Appraisal Institute exercises direct and fundamental control over its chapters, and (iii) the chapters are neither separate nor autonomous from the Appraisal Institute. Accordingly, the conclusion is inescapable that the appointment of a third member of the Appraisal Institute to the Board, regardless of chapter affiliation, is inconsistent with A.R.S. § 32-3604(D).

Although it is not necessary to look beyond the legislative language to identify the Legislature's intent in this case, the history of the Board's enabling legislation also provides support for this conclusion. In 1990, a representative of the Arizona Appraisal Coalition spoke in support of H.B. 2333 (the legislation that created the Board) and provided a handout for consideration. *Hearing on H.B. 2333 before the Committee on Tourism, Professions and Occupations, and Commerce*, 39th Leg. (February 26, 1990). The handout included guidelines for state certification and licensing of real estate appraisers developed by the Appraisal Subcommittee. *Id.* at attachment 9. The guidelines provided, in part:

The subcommittee believes it is preferable that the certification and licensing function be established as a totally independent regulatory agency answerable to the governor or a cabinet level officer who has no regulatory responsibility for realty related activities. Such a structure would provide maximum insulation for the agency from influences of any industry or organization whose members have a direct or indirect financial interest in the outcome of the agency's decisions (hereinafter "affected industry").

....

If the agency is directed by a board or commission, the members of that board should represent the broad public interest, and the statute, regulation, or order creating that body should not permit a majority of the board to come from or be dominated by any one industry or profession. Moreover, after its initial establishment, the composition of the board should continue to remain free from domination by any one industry or profession.

*Id.* at 2, 4. In its 1997 Annual Report, the Appraisal Subcommittee further clarified its position on the necessary independence of the state body established to license and regulate appraisers. The Subcommittee recognized that "[a] state agency, board or commission . . . should reflect the interests of the state's entire community of appraisers and the general public and not the interests of any professional appraiser organization." 1997 Appraisal Subcommittee Ann. Rep. at 32. Although three Appraisal Institute Board members could not control the decisions of the nine member Board, the Appraisal Subcommittee's policy concerns are consistent with the limitations in A.R.S. § 32-3604.

**B. The Common Law Principle of *De Facto* Public Officers Validates the Previous Board Actions in Which the Appointee Participated.**

Although the recent appointee has signed an oath of Office and has participated in Board decisionmaking,<sup>(2)</sup> Arizona courts have applied in cases of this type a common law principle to validate the acts of *de facto* public officers. See *Johnson v. Maehling*, 123 Ariz. 15, 18 - 19, 597 P.2d 1, 4 - 5 (1979) (deputy registrars whose appointments were irregular served as *de facto* public officials because the irregular appointment procedure was not known to the public); *McCluskey v. Hunter*, 33 Ariz. 513, 535, 266 P. 18, 26 (1928) (*de facto* Colorado River Commission's actions were as binding on the State and third parties as if the Commissioner had received a commission and qualified by taking the oath of office). The Arizona Supreme Court has defined *de facto* officer and identified four situations in which the concept would be applied. *Rogers v. Frohmiller*, 59 Ariz. 513, 521, 130 P.2d 271, 274 (1942) (quoting *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409 (1871)). The *Rogers* opinion provides:

An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised,

First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be.

Second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a

bond, or the like.

Third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public.

Fourth, under color of an election or appointment by or pursuant to a public unconstitutional law before the same is adjudged to be such.

*Id.*

Applying this test, the available facts indicate that the new appointee has been acting as a *de facto* Board member because the appointee performed under color of a known appointment which would be rendered void because the appointee was not eligible to hold the position to which appointed and the defect was unknown to the public. *See Johnson*, 123 Ariz. at 19, 597 P.2d at 5 (voter signatures collected by *de facto* deputy registrars are valid).

Consequently, the Board's decisions in which the appointee participated should survive challenge for noncompliance with A.R.S. § 32-3604 (D). In an abundance of caution, however, the Board may wish to consider ratifying the decisions in which the appointee participated. Your assigned Assistant Attorney General representative is available to assist you on the process of ratification.

Of course, after the issuance of this Opinion, the appointee is no longer eligible for *de facto* status. The only action which would cure the current eligibility defect would be resignation from the Appraisal Institute.

### **Conclusion**

The appointment of a third member of the Appraisal Institute to the Board is inconsistent with A.R.S. § 32-3604(D), which prohibits more than two members from any professional organization or association serving concurrently. Any Board decisions in which the appointee participated could be challenged because the appointee was not eligible to hold the position to which appointed, however, the common law principle establishing the status of a *de facto* officer should apply to validate the appointee's participation in Board decisionmaking. The Board may also wish to ratify such decisions in an abundance of caution.

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1. The Appraisal Institute is a voluntary association. Should the appointee relinquish her membership in the Appraisal Institute, the appointment would no longer be inconsistent with A.R.S. § 32-3604 (D).

2. Because the appointee has not been confirmed by the Senate, there is no need to consider a removal action under A.R.S. § 12-2041. It is hoped that this Opinion will provide the information necessary to allow those involved to

reach an appropriate resolution, which could include either rescinding the appointment or having the appointee resign from the Appraisal Institute.

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