

STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>December 3, 2004</p>	<p>No. I04-011 (R04-029)</p> <p>Re: Inflation Adjustment of Square Footage Cost for New School Construction</p>
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To: William Bell, Executive Director
School Facilities Board

Questions Presented

You have asked the following questions regarding the cost per square foot allowed for new school construction:

1. May the School Facilities Board (“SFB”) adjust the amount budgeted for construction of a new school based on an inflation adjustment that is made pursuant to Arizona Revised Statutes (“A.R.S.”) § 15-2041 after the SFB approved the construction project?
2. If so, does the SFB have the authority to give such a cost adjustment to some projects but not to others based on specific criteria?

Summary Answer

Typically the base cost for a new school construction project is established when the Terms and Conditions for a project are signed. After the Terms and Conditions are signed, the base cost may be increased only if SFB finds good cause. Because of the good cause requirement, the SFB has discretion to determine which projects qualify for a cost adjustment after a project has been approved.

Background

A. The Students First Act of 1998.

In *Roosevelt Elementary School District No. 66 v. Bishop*, 179 Ariz. 233, 877 P.2d 806 (1994), the Arizona Supreme Court held that the system then in place for funding capital improvements for Arizona public schools violated Arizona's constitutional guarantee of maintaining a general and uniform public school system. *Id.* at 241-43, 877 P.2d at 814-16. In response to this decision, the Legislature passed Students First. *Hull v. Albrecht*, 192 Ariz. 34, 960 P.2d 634 (1998).

Students First established three funds for addressing the capital needs of Arizona public schools: the New School Facilities Fund, A.R.S. § 15-2041; the Deficiencies Correction Fund, A.R.S. § 15-2021, and the Building Renewal Fund, A.R.S. § 15-2031. The Act created the SFB and charged it with the task of overseeing the expenditures of Students First monies. A.R.S. §§ 15-2001 through

2006. The SFB also is required to establish minimum school facility adequacy guidelines to insure a general and uniform public school system. A.R.S § 15-2011.

B. The New School Facilities Fund.

The New Schools Facilities Fund was created to fund new school construction in accordance with the minimum school facility adequacy guidelines. Section 15-2041, A.R.S., sets forth the process for determining a school district's eligibility for monies for new school construction. If a district's capital plan indicates a need for a new school within the next four years, the district must submit a plan to the SFB by September 1 and request money from SFB for the new construction. A.R.S. § 15-2041(C). SFB reviews and evaluates the district's enrollment projections and either approves or revises the projections. A.R.S. § 15-2041(D)(1).

If the SFB determines that the additional space will not be needed within the next two years (in the case of an elementary school) or three years (in the case of a middle or high school) in order to meet the building adequacy standards, the SFB may hold the request for consideration for possible future funding, and the district must submit annually an updated plan until the additional space is needed. A.R.S. § 15-2041(D)(2). If the SFB determines that the additional space will be needed within the statutory time frames, the SFB then determines the amount of funding for the new construction pursuant to the formula prescribed by statute. A.R.S. § 15-2041(D)(3). The amount of money provided for a new school

construction project is calculated based upon the number of pupils requiring additional square footage to meet the building adequacy standards, the square footage required per pupil to meet the adequacy standards, and the statutory cost per square foot. A.R.S § 15-2041(D)(3)(b) and (c).

Initially, the statutory cost per square foot was \$90 for preschool programs for children with disabilities, kindergarten programs, and grades one through six, \$95 for grades seven and eight and \$110 for grades nine through twelve. A.R.S. § 15-2041(D)(3)(c). The Legislature recognized, however, that costs of construction may fluctuate from time to time due to market conditions. Therefore, the Legislature allowed for an increase in the base cost, the “Inflationary Increase,” by specifying that the base cost is to be adjusted at least annually as follows:

The cost per square foot shall be adjusted annually for construction market considerations based on an index identified or developed by the joint legislative budget committee as necessary but not less than once each year.

Id. Since the enactment of Students First, the base cost has been adjusted periodically to reflect fluctuations in the construction market. In addition, the Legislature authorized the SFB to increase the base cost if the school is located in a rural area or “based on geographic conditions or site conditions.” *Id.*

Once the SFB approves a new school construction project and determines the appropriate funding level, the school district has 60 days from the date of notification to officially accept, in writing, funding for the square footage approved by the Board. Arizona Administrative Code (“A.A.C.”) R7-6-502(D).

After a district accepts the funding and signs a “Terms and Conditions for New School Funding” (“Terms and Conditions”) agreement, the SFB provides 5% of the approved funding for architectural and engineering fees. *Id.*; A.R.S. § 15-2041(E). After receiving this money, the district must submit a design development plan and specifications, including budget estimates, for the project to the SFB for review and comment before any additional money is distributed. A.R.S. § 15-2041(E); A.A.C. R7-6-502(E). After the SFB staff reviews the plan and budget estimates, the district must put together a preliminary bid package and submit it to the SFB. A.A.C. R7-6-502(E).

After reviewing the design, budget estimates and preliminary bid package, the SFB staff makes a recommendation to the Board regarding the appropriateness of the district proceeding with the project. A.A.C. R7-6-502(G). This recommendation is based on whether the project is within the original scope the SFB approved budget, whether it meets the building adequacy standards, initial comments from the local building authority, and whether revised projections continue to justify the project. *Id.* If the SFB approves the project, the district is authorized to proceed with a final bid package. *Id.* The Executive Director of the SFB will authorize the district to proceed with the contract if the district has documented that it has obtained local building department approval, the bid is within the original scope and the SFB approved budget, and meets the building adequacy standards. A.A.C. R7-6-502(H). SFB approved funding for new school construction is available to the district for one year from the date of notification of

approval, and the bid process must be completed within that year. A.A.C. R7-6-502(I).

A potential problem arises when there is a delay between the time that the SFB approves the project and the time that construction on the project actually commences. The question raised here is whether a project can receive the Inflationary Increase after the Terms and Conditions agreement has been signed.

Analysis

A fundamental rule of statutory construction is to find and give effect to legislative intent. *State v. Thompson*, 204 Ariz. 471, 474, 655 P.3d 420, 423 (2003). When a statute is ambiguous, courts determine legislative intent by reading the statute as a whole and by considering the statute's context. *See State v. Gallagher*, 205 Ariz. 267, 268, 69 P.3d 38, 39 (App. 2003).

Pursuant to A.R.S. § 15-2041(D)(3), the SFB “shall provide an amount” to build a new school that is determined by multiplying a per pupil square footage calculation by the cost per square foot. There are four factors that may increase the square footage amount: (1) the Inflationary Increase; (2) the automatic adjustment for schools located in rural areas; (3) geographic conditions; (4) and site conditions. The express mention of these four circumstances indicates that the Legislature intended to exclude all others. *Powers v. Carpenter*, 203 Ariz. 116, 18, 51 P.3d 338, 340 (2002). Thus, the SFB may only adjust the base square footage cost for the reasons the statute identifies.

The statute does not specify whether the square footage cost may be changed after the cost is initially established for a project. The authorized cost adjustments are in the portion of the statute that address the amount of funding SFB provides to a district after the SFB approves the enrollment projections. *See* A.R.S. § 15-2041(D)(3). This suggests that SFB is to apply these cost adjustments at that time. The issuance of the Terms and Conditions agreement formalizes the SFB's analysis of a district's request and triggers the distribution of money for new school construction. A.R.S. § 15-2041(E); A.A.C. R7-6-502(D). This means that the cost per square foot is based upon the statutory base cost (including any Inflationary Increases) in effect when the SFB issues the Terms and Conditions. Any Inflationary Increase that is approved after the Terms and Conditions would not apply to a project for which Terms and Conditions have already been executed.

The statutory language, however, does not foreclose the possibility of cost adjustments after the Terms and Conditions are executed. For example, the statute permits adjustments based on site or geographic conditions, and there are site or geographic conditions that would justify a cost adjustment that are not known until after construction is underway. Thus, the flexibility the statute provides would be frustrated by not permitting modifications after the Terms and Conditions are executed. Further, the regulations allow for this flexibility by permitting SFB to modify or waive requirements for "good cause." A.A.C. R7-6-402(J).

Just as there may be unforeseen site conditions that justify a cost increase, there may be circumstances in which project delays justify modifying the base cost of a project to update the Inflationary Increase. Thus, if SFB determines good cause exists, it may permit an inflationary increase after the terms and conditions are executed.

Conclusion

The base cost of a new school construction project, with any Inflationary Increase, is determined at the time Terms and Conditions for the project are executed. The SFB may modify the base cost for a particular project based on a subsequent Inflationary Increase only based upon finding of good cause.

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