

Senator Vince Leach
District 11

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Arizona State Senate

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Appropriations
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March 14, 2022

Sent via US Mail and Email

Honorable Mark Brnovich
 Arizona Attorney General
 2005 N Central Ave
 Phoenix AZ 85004
 agopinionrequests@azag.gov

Re: Request for Legal Opinion on Arizona Constitution, Article IX, Section 25.

Dear General Brnovich:

In November 2018 Arizona Voters passed Proposition 126 which amended the Arizona Constitution by adding to Article IX:

25. Prohibition of new or increased taxes on services

Section 25. The state, any county, city, town, municipal corporation, or other political subdivision of the state, or any district created by law with authority to impose any tax, fee, stamp requirement, or other assessment, shall not impose or increase any sales tax, transaction privilege tax, luxury tax, excise tax, use tax, or any other transaction-based privilege tax, fee, stamp requirement or assessment on the privilege to engage in, or the gross receipts of sales or gross income derived from, any service performed in this state. This section does not repeal or nullify any tax, fee, stamp requirement, or other assessment in effect on December 31, 2017.

Additionally, Proposition 126 added to Article XIII, Section 2 of the Arizona Constitution, "Notwithstanding any provision of this section to the contrary, no charter shall provide a city with any power to violate Article IX, section 25, which preempts such power."

However, Proposition 126 did not define what constitutes a "service" nor did it identify the scope and nature of the business activity to which this new constitutional protection should apply. Because of this ambiguity, many Arizona businesses are struggling with whether the protections in Proposition 126 apply to them.

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One such industry is the residential construction industry. Home builders are typically taxed by the State and its counties under the “prime contracting” transaction privilege tax (“TPT”) classification. State statute defines “prime contractor” as

a contractor who supervises, performs or coordinates the modification of any building, highway, road, railroad, excavation, manufactured building or other structure, project, development or improvement, including the contracting, if any, with any subcontractors or specialty contractors and who is responsible for the completion of the contract.¹

As used in the statute, “modification” includes, “construction, grading and leveling ground, wreckage or demolition.”²

Similarly, the Model City Tax Code (“MCTC”), adopted by Arizona’s cities and towns, imposes a tax on “every construction contractor engaging or continuing in the business activity of construction contracting.”³

Given the lack of clarity in Proposition 126 as to the scope and extent of activities which constitutes a service, I am turning to your office for guidance. I, therefore, respectfully request a written opinion pursuant to A.R.S. § 41-193 to address whether a home builder acting as a “prime contractor” or “construction contractor” is engaging in a “service” and thus immune from any tax increase pursuant to Article IX, Section 25 of the Arizona Constitution.

I am aware of several jurisdictions which have TPT increases that have taken or will take effect after December 31, 2017. Given the importance of home building to Arizona’s economy and the industry’s continued ability to provide affordable housing, it is imperative that we receive your guidance as quickly as possible. Thank you very much for your consideration of this request.

Very truly yours,

Senator Vince Leach
Legislative District 11



¹ A.R.S. § 42-5075(R)(10).

² A.R.S. § 42-5075(R)(6).

³ MCTC § -415(a).