

# RISK REVIEW

VOLUME 24, ISSUE 4

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## Appeals Court upholds funding system for stormwater management

The Arizona Court of Appeals, District One, has affirmed a Superior Court ruling that the City of Flagstaff's ordinances creating a charge-and-credit system to fund a stormwater management utility are constitutional.

However, the Court of Appeals found that sufficient evidence had been presented to show the ordinances had been applied in an unconstitutional and discriminatory manner and remanded that matter back to the Coconino County Superior Court for further proceedings.

Despite that action, the Court of Appeals acknowledged "the Arizona courts have never created a damage remedy for violations of the state constitution, and we decline to do so here."

In 2001, the City of Flagstaff enacted ordinances adopting floodplain management regulations and a stormwater management design manual, which required installation of detention structures for new subdivisions, commercial and industrial developments, redevelopments of non-conforming sites and other developments larger than a quarter acre. Another ordinance established a City stormwater management utility, which was to construct and manage drainage systems.

The utility was to be funded by service and system development fees, which could be offset by credits to property owners who took steps to reduce runoff. In March 2003, the City enacted Ordinance 2003-02, which established a charge schedule.

In October 2003, Fred Nackard Land Company; LNN Enterprises, Inc.; Richard Anderson; and West Village Estates – all of whom were plaintiffs in the lawsuit challenging the ordinances – submitted a notice of claim to the City, asserting they had installed detention structures on their properties, but their fees had not been reduced by credits.

The plaintiffs also claimed that owners of undeveloped property had not been charged fees. As a result, they alleged that the City had violated their equal protection and due process rights under both the United States and Arizona Constitutions and had also violated Arizona Constitution Article 15, § 12. They claimed the fees were an unlawful tax and offered to settle for \$100 million. A lawsuit was filed in June 2004.

The parties stipulated to class certification, and the Coconino County Court certified a class comprised of all property owners

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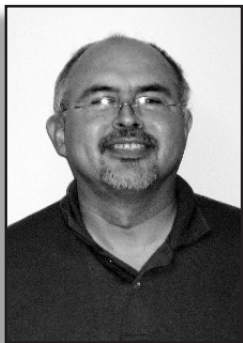
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**Rudy Rodriguez**  
AMRRP President

## LETTER FROM THE PRESIDENT

Dear AMRRP Members:

One of the strengths that continues to contribute to our Pool's longstanding success is our ability to attract Board members who are both knowledgeable about the complex insurance and risk management issues faced by Arizona municipalities and who are dedicated to finding ways in which the AMRRP can provide assistance in those areas. Fortunately, our Board has had considerable stability over the years, with some longstanding Trustees celebrating nearly two decades of service to the Pool. Even more fortunately, when Board openings have come up, we've had extremely qualified candidates who were willing to volunteer their time to ensure the AMRRP's continued success.

Shortly after our Board elections last summer, long-time Board member Jean Poe tendered her resignation from the AMRRP Board after she left her position as Risk Manager for the City of Surprise and assumed a new position in the Maricopa County Risk Management Department. Jean will be greatly missed, both as an AMRRP Trustee and as the Co-Chairperson of our Loss Control Committee. On behalf of the Board, we thank Jean for her years of hard work and dedicated service to our Pool and we certainly wish her the best in her new career with Maricopa County.

With Jean's departure however, we were extremely fortunate to be able to welcome Camp Verde Town Council Member Jackie Baker back to the AMRRP Board, with Jackie having been selected to fill Jean Poe's position at our September meeting. Jackie had previously served on the AMRRP Board of Trustees from 2000 to 2007, and she received the next-highest number of votes in last summer's Trustee elections. Jackie's long-time familiarity with the AMRRP's programs and operations along with her extensive experience as an elected official in the Town of Camp Verde will once again make her a valuable asset to our Pool.

Also at the September meeting, our Board held its annual election of officers. I would like to express my sincere appreciation for being re-elected to continue as Board of Trustees President for another year. I am honored by the Board Members' continued confidence and grateful for their ongoing support. In addition, I would like to congratulate Scott Barber of the City of Casa Grande and George Hoffman of the City of Apache Junction on being elected to the respective positions of Vice President and Secretary/Treasurer of our Board of Trustees after they both agreed to exchange the officer positions each held on last year's Executive Committee.

As our Pool and its Members strive to address the future economic and political challenges that budgetary shortfalls and an ever-evolving legal climate are sure to bring, it's gratifying to see the willingness and enthusiasm that our membership consistently demonstrates in dedicating themselves to supporting the AMRRP and its continued commitment to serving Arizona cities and towns. On behalf of the 2010-2011 AMRRP Board of Trustees, we thank you for your ongoing loyalty and for your confidence in our leadership.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Rodriguez". The signature is fluid and cursive, written in a dark ink on a white background.

Rudy Rodriguez  
President, AMRRP Board of Trustees

## Member Profile: *The City of Holbrook*

Holbrook, the county seat of Navajo County in northeastern Arizona on Interstate 40, portrays itself as a wild west frontier town and way station for travelers.

Holbrook got its start as Horsehead Crossing in 1878 when Juan Padilla set up a saloon, which became a favorite watering hole for travelers headed for California. The enterprise fell apart when the saloon manager's wife was abducted by a patron from Show Low.

In 1881, the railroad came through northern Arizona. John W. Young, Brigham Young's son, contracted to provide ties for the line and developed a new town just to the west of Horsehead Crossing. Young named the town after H. R. Holbrook, chief engineer of the Atlantic and Pacific Railroad. By 1895, Holbrook had become the county seat, and it was incorporated in 1917.

In 1887, the infamous Pleasant Valley War, also known as the Graham-Tewksbury feud, spilled over into Holbrook. Andy Cooper, a member of the Graham faction, ambushed and killed two men in the Tewksbury faction. He sought refuge in a Holbrook home. The Apache County sheriff, Commodore Perry Owens, had a warrant for Cooper for horse stealing and went to the home to arrest Cooper. A shootout ensued in which Owens shot and killed Cooper, John Blevins, Mose Roberts and 14-year-old Sam Houston Blevins. Controversy continues. Many consider Owens a hero while others feel he was a hired assassin brought in to rid the area of desperados.

In 1899, the Navajo County Sheriff, Frank Watron, received a reprimand from President William McKinley for sending out an invitation to the hanging of George Smiley. The invitation: "His soul will swing into eternity on Dec. 8, 1899 at 2 o'clock P.M. sharp. The latest improved methods of scientific strangulation will be employed and everything possible will be done to make the surroundings cheerful and the execution a success."

In 1885, the Aztec Land and Cattle Company of Boston established its headquarters in Holbrook. The third largest

cattle company in North America, the organization was better known as the Hashknife Outfit, because their brand resembled the old hash knives used by chuck wagon cooks. The Aztec Cattle Company purchased one million acres of former railroad land from the Atlantic and Pacific for 50 cents an acre in 1886. The ranch claimed a range that stretched some 650 miles from the New Mexico border to just south of Flagstaff.

The company bought the Hashknife brand and some 33,000 head of cattle and 2,000 horses from the Continental Cattle Company in Texas. When the stock arrived by rail, they were let off the train at stops all across northern Arizona. Along with the cattle came a number of original Hashknife cowboys. These buckaroos quickly gained the unsavory reputation of being the "thievinist, fightinest bunch of cowboys" in the United States.

The Aztec Cattle Company liquidated its holdings following a disastrous blizzard in 1899 that killed thousands of cattle. However, the Hashknife name lives on as the Navajo County Hashknife Sheriff's Posse, which stages a pony express ride from Holbrook to Scottsdale to signal the start of the Parada del Sol.

In the 1930s through the 1950s, Holbrook served travelers on Route 66, known as The Mother Road and The Main Street of America. This narrow strip of asphalt was a symbol of hope for farmers fleeing the dust bowl and soldiers starting a new life after World War II. A reminder of that era still exists – Chester E. Lewis' Wigwam Motel, which was listed on the National Register of Historic Places in 2002.

Today, Holbrook serves as a hub for travelers touring Navajo, Hopi and Apache country. Holbrook is just 28 miles from the Petrified Forest National Park, which features one of the world's largest and most colorful concentrations of petrified wood. Near the south end of the park is Agate House, a Native American building of petrified wood, reconstructed during the 1930s. ❁

## Court affirms immunity for deputies in arrest on failure to pay child support

The Arizona Court of Appeals, District One, has upheld a Maricopa County Superior Court ruling granting qualified immunity to two Maricopa County Sheriff's deputies who arrested a suspect for failure to pay child support even though the suspect claimed the warrant for his arrest had been quashed.

"Defendants reasonably relied on official information regarding the validity of [Clifford J.] Ochser's warrant and relied on a facially valid warrant," says the recent decision. "Defendants checked the validity of the warrant prior to executing it."

However, Justice Diane Johnsen dissented, saying "because Ochser submitted evidence on which it may be concluded that the deputies knew or should have known that their conduct violated a clearly established constitutional right, I would reverse the judgment and remand for trial."

In May 2004, the Maricopa County Sheriff's Office (MCSO) conducted "Operation Mother's Day 2004," an operation to arrest parents with outstanding child support warrants. According to testimony, each of the warrants was checked for validity.

Ochser's name was included because there had been an arrest warrant issued in January 2003 for unpaid child support. The arrest warrant was quashed in March 2003, but it had remained active on the MCSO list. A MCSO supervisor testified during the Superior Court trial that "MCSO was most likely not contacted by the court to quash the warrant." Another supervisor told the court that no notice of the quashed warrant had been received between March 2003 and the end of September 2003.

On May 5, 2004, Deputy Gerard Funk and Sergeant Anthony Cruz confronted Ochser at his workplace in Flagstaff. After Ochser protested and told them the warrant had been quashed, one of the officers claimed he called MCSO and the judge's chambers to inquire about the warrant, and MCSO affirmed its validity. The officers proceeded to arrest Ochser.

Ochser later questioned whether the deputies did indeed call to check on the validity, but the decision notes, "It is undisputed that MCSO's records, which defendants checked prior to executing the warrant, reflected Ochser's warrant was active."

Ochser was released the following day after it had been determined the warrant had been quashed. He then filed a complaint, alleging among other things violations of his Fourth and Fourteenth Amendment rights.

The deputies filed a motion for summary judgment saying Ochser had failed to comply with the state's notice of claim statute and that they had arrested Ochser on a facially valid warrant and were entitled to qualified immunity on all claims.

The trial judge granted the deputies' motion for summary judgment, saying "U.S. Supreme Court and Ninth Circuit authority provide that a law enforcement officer is entitled to qualified immunity ... when the officer makes an arrest on a facially valid warrant. Plaintiff does not contest that the warrant was valid on its face. In essence, plaintiff argues that these defendants were required to investigate plaintiff's claim that the warrant had been quashed."

The trial judge cited a U.S. Ninth Circuit Court of Appeals 1986 decision in ruling that "defendants' failure to investigate did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'"

Ochser appealed.

"When reviewing a grant or denial of summary judgment, 'we determine de novo whether any genuine issues of material fact exist and whether the superior court properly applied the law,'" says the majority opinion.

"We conclude that in light of a facially valid arrest warrant, the unlawfulness of Ochser's arrest was not readily apparent to defendants," says the majority opinion. "It is undisputed that Ochser's warrant was facially valid. Defendants had no knowledge or information, prior to Ochser's assertions the day of his arrest, that the warrant had been previously quashed. The warrant itself had been officially and validly issued in connection with Ochser's prior failure to pay child support.

"We find that the trial court did not err and affirm the order dismissing this case," concludes the minority opinion.

In her dissent, Justice Johnsen notes discrepancies in Ochser's

## Personnel Perspectives and Lessons In Land Use

Featuring legal issues from the AMRRP Personal Assistance Lifeline (PAL) and Land Use Assistance Lifeline (LUAL)

### AMRRP Personnel Assistance Lifeline (PAL) Q&A

By Justin Pierce, Jackson Lewis, LLP

**Question:** Our police department is getting ready to fire a sergeant for general poor performance over the last year. We're concerned that in the appeal process to the personnel board, she will argue that even if she had not been performing up to par as a supervisor, she should only have been demoted. Absent a specific act of serious misconduct (lying, etc.), can we terminate an officer if there is a "progressive" step such as demotion available?

**Answer:** Unless your policies state otherwise, you are not required to demote a supervisor before firing him or her. That said, you should be aware of the new Arizona statute that took effect on July 29, 2010 – Arizona Revised Statute (A.R.S.) § 38-1104. This section establishes a "good cause" standard applicable to discipline against all law enforcement officers in the state. (As an aside, for those of you out there who may still be "at-will" employers, take notice that this changes the at-will relationship as it pertains to law enforcement officers and, consequently, will require you to go through all of the due process procedures in the event you decide to take employment action with one of your law enforcement officers.) The statute requires that if you're going to discipline a law enforcement officer:

- (1) The officer had to have had fair notice that his or her conduct could result in discipline;
- (2) The disciplinary action must be reasonably related to the standards of conduct for a professional law enforcement officer, the mission of the agency, the orderly, efficient or safe operation of the agency or the officer's fitness for duty;
- (3) The discipline is supported by a "preponderance of the evidence," and
- (4) The discipline is not excessive and is reasonably related to the seriousness of the offense and the officer's service record.

With this standard in mind, you should be sure that the sergeant's poor performance meets this standard. If, for example, you have had other similarly situated supervisors who were demoted after general poor performance, you probably

won't be able to prove that the decision to terminate is not "excessive" and "reasonably related to the seriousness of the offense." If you have been consistent, and your decision meets the new standard set forth in A.R.S. § 38-1104, your decision should be upheld by a personnel board.

### AMRRP Land Use Assistance Lifeline (LUAL)

#### Did you want to own, operate and manage a city park?

By William J. Sims III, Moyes, Sellers & Sims

There is a chain of cases (and even a statute) involving the dedication of land for public purposes that could result in your city or town actually having to own, operate and manage a public park when you have had little direct input as to whether or not your city or town wanted a new city park.

The statute is Arizona Revised Statutes (A.R.S.) § 9-254. It provides that upon the filing of a map or plat, "the fee of the streets, alleys, avenues, highways, parks and other parcels of ground reserved therein to the use of the public vests in the town, in trust, for the uses therein expressed." When this statute was initially adopted in 1901, it included a requirement that before property could be dedicated to a city or town, the city or town council would have to approve such dedication. In 1956 when the statute was recodified, the city or town council approval requirement was dropped. As a result, the courts stepped in and created ways that property could be dedicated under the doctrine of "common law dedication."

In 1905, a property owner recorded a plat that included a reference to a parcel that was "dedicated to public use forever, for park and public building purposes only." In a quiet title action, *County of Yuma v. Leidendeker*, 303 P.2d 531 (Ariz. 1956), the court upheld a dedication even though the city council had not reviewed or approved the plat that resulted in the dedication. The court ruled that simply recording the plat with the language dedicating the parcel for park purposes and the subsequent purchase of lots referencing the plat with the dedication resulted in a common law dedication of the park. This view was confirmed more recently in *Pleak v. Entrada Property Owners' Association*, 87 P.3d 831 (Ariz. 2004). There the Arizona Supreme Court clearly identified the rules

## PERSONNEL PERSPECTIVES AND LESSONS IN LAND USE

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for dedicating land for a public park: “Our cases discussing common law dedications of parks teach that the sale of lots referencing a recorded plat containing the dedication constitutes an ‘immediate and irrevocable’ dedication.” *Id.* at 837.

The result of this case law could be that cities and towns could be saddled with the costs of operating and maintaining property as a public park and could be exposed for liabilities arising out of the use of such parks without any input, approval or even awareness that a public park has been created. What should you do?

1. Make certain that you follow the requirements of A.R.S. § 9-463.01 which makes all plats subject to council approval.
2. If a plat contains language dedicating property to the city or town for public purposes, make any such dedication subject to conditions and requirements that the city or town requires for the integration of the proposed park with the city or town’s park system and make certain that the size and configuration of the proposed park is acceptable.

3. If your city or town is uncertain about the future use of the dedicated property as a park, avoid the implications of *Pleak v. Entrada* (i.e., imposing a park on your city or town against your will); have the plat address what happens to the property if your city or town chooses not to maintain the property as a park. Under A.R.S. § 9-463.01.G.3, that will require an approval process for a replat comparable to the process used for approving an initial plat.

4. In some cases, a city or town may actually have an ordinance permitting the replatting process even if the plat does not include the language requiring a replat.

You know the old saying: “Don’t look a gift horse in the mouth.” But, when it comes to dedicated property for public park purposes, you better be prepared to explore all aspects of the equestrian digestive system to make sure the gift does not turn into a park that saddles your city or town with operations and maintenance expenses for years to come. ❁

## APPEALS COURT UPHOLDS

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required to construct detention systems and being charged a stormwater runoff fee.

By January 2007, the City had adopted two additional ordinances – 2004-22 and 2006-17 – on credits and fees, and the plaintiffs filed an amended complaint seeking a declaration that all the ordinances were unconstitutional and seeking compensatory damages based on violations of the Arizona Constitution.

The Coconino County Court concluded the plaintiffs’ notice of claim did not meet statutory requirements and that the ordinances were constitutional. The Court held that met a “rational basis test.” In its written decision, the Appeals Court explained that “an ordinance will be upheld under the rational basis test so long as it is ‘rationally and reasonably related to further some legitimate government interest.’ Under that standard, ‘[a] perfect fit is not required; a[n] ordinance that has a rational basis will not be overturned merely because it is not made with mathematical nicety, or because it results in some inequality.’”

Plaintiffs filed a motion for a new trial, adding a claim that the City had applied its charge schedule in an unconstitutional manner. The Coconino County Court denied the motion and dismissed the claim with prejudice as to the plaintiffs, but without prejudice as to the class.

In reviewing the ordinances, the Appeals Court said, “The classifications the ordinances draw can be rationally tied to legitimate legislative objectives. Though not all properties burden the utility equally, all benefit from its services. The decision to charge developed land but not charge undeveloped land is supported by evidence concerning the comparative likelihood that developed property will contribute to the velocity and pollution content of stormwater runoff. Objections to the substance and fairness of such policy decisions are properly directed to the legislative branch.

“We conclude, therefore, that there is a rational basis for the charge-and-credit system and that the superior court did not

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## COURT AFFIRMS IMMUNITY

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and the two deputies' versions of the arrest, which took place in the parking lot of Ochser's workplace. Ochser claims he told the deputies he had a copy of the order quashing the warrant in his office. One deputy denied the claim, and the other said, "I do not recall that, but it could be possible." One deputy, Funk, did enter the office building, leaving Ochser and the other deputy in the parking lot. Funk testified he called Sheriff's officer in charge and verified the warrant was valid. Funk also testified "he telephoned a judge's office and spoke to a temporary worker who 'had no clue on how to check anything.'" The other deputy, Cruz, testified that when Funk returned he told Cruz "he had reached a court clerk who confirmed that the warrant was valid."

In her dissent, Johnsen says, "Ochser's contention is not that Funk and Cruz were obligated to launch an independent investigation into the validity of the warrant. Rather, Ochser contends the deputies should not have brushed aside his offer to provide them with a certified court document proving that the warrant they were trying to execute had been quashed.

"Reasonable law enforcement officers could not disagree that the deputies should have retrieved and inspected the order Ochser offered that quashed the warrant they were there to execute," she says. "Because Ochser submitted evidence on which it may be concluded that the deputies knew or should have known that their conduct violated a clearly established constitutional right, I would reverse the judgment and remand for trial." ❁

## Arizona sales help TULIP grow

According to an article in the National League of Cities' September RISC Report, the League's Tenant Users Liability Insurance Policy (TULIP) program has grown faster than expected, and purchases in Arizona and Rhode Island have been the most active.

"Purchases in all participating states have been greater than expected in the first quarter of 2010, representing we think some great marketing and outreach efforts being made by participating pools," says the article.

The RISC Report says more than 660 TULIP policies have been sold since the program's inception in 2008 for a total premium of \$142,899.

"Those policies represent community events that may not have had insurance coverage or could have put municipalities (and pools) at risk of loss," says the article. ❁

## APPEALS COURT UPHOLDS

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err in granting summary judgment for the City concerning the facial validity of the challenged ordinances," says the decision.

In reviewing how the City collected fees, the Appeals Court noted: "Ordinance 2003-02 provides that all properties that incur charges shall be billed, regardless of the presence or absence of a City water meter. Nevertheless, it is undisputed that only properties with City water meters have received bills. Plaintiffs contend that because the City has enforced the ordinances based upon a classification that is neither embodied in the ordinances nor supported by a rational relationship to a legitimate legislative goal, it has violated the equal protection guarantee. We agree that the evidence could support such a

conclusion."

However, the Appeals Court also notes that a discriminatory charge on the method of billing was only raised in the motion for a new trial and the matter has not received a full hearing.

"We express no opinion concerning the validity of the Plaintiffs' assertion that properties exist that should have been billed, or the City's ability to demonstrate that such a classification could pass muster under the rational basis test," says the Appeals Court decision. "On this record, we cannot hold the summary judgment was appropriate. We therefore remand this case for further proceedings." ❁

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The AMRRP is a non-profit corporation created in 1987. Its primary purpose is to provide property and casualty coverages to incorporated cities and towns in Arizona. AMRRP is sponsored by the League of Arizona Cities and Towns. AMRRP is governed by a nine member board elected by representatives of participating cities and towns.

*Risk Review* is published by AMRRP in a continuous effort to inform and educate its member cities and towns. Suggestions for article topics are welcome. Contact AMRRP at the above address and phone number.