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February 27, 2023

Via Email

Brian McIntyre
Cochise County Attorney

Re: Draft Agreement to delegate the Board of Supervisors' election duties to the Recorder

Mr. McIntyre:

I understand from a notice posted yesterday, February 26, 2023, that the Cochise County Board of Supervisors has scheduled a public hearing tomorrow, February 28, 2023, at 10:00 a.m. The agenda indicates that the Board intends to vote to "Approve [an] Agreement with the Cochise County Recorder (Recorder) for Election Services," which agreement appears to delegate nearly all of the Board's authority over elections to the Recorder. Among other things, the draft Agreement purports to "combin[e] all election-related functions under one department" (the Recorder); delegate all "responsibility for the operation and administration of elections" to the Recorder; and, with a handful of exceptions, make the Recorder "responsible for all other election functions."

The Attorney General has serious questions about the legality of the Board's intended course of action, some of which are noted below.

The Board "can exercise only those powers specifically ceded to it by the legislature." *Hart v. Bayless Inves. & Trading Co.*, 86 Ariz. 379, 384 (1959). The Recorder's authority is likewise limited. *See Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 62 ¶ 14 (2020). Whether granted by the Arizona Constitution or by statute, the County's delegated powers are "strictly construed." *Vangilder v. Ariz. Dep't of Rev.*, 252 Ariz. 481, 488 ¶ 24 (2022) (citation omitted).

The Board has statutory authority over several election functions, including establishing election precincts, *see* A.R.S. §§ 11-251(3), 16-411(A); the appointment of election judges, inspectors, marshals, and boards, *see* A.R.S. §§ 11-251(3), 16-531, 16-535, 16-551(A); the preparation of ballots and voter instructions and notices, *see* A.R.S. §§ 16-503, 16-513, 16-514, 16-515; and the canvassing of election returns, declaration of results, and issuing of certifications

thereof, *see* A.R.S. §§ 11-251(3), 16-642, 16-645, 16-646(C), 16-647. This authority is granted by statute to the Board, and not any other county officer. County recorders have authority over other aspects of elections, such as those related to voter registration, early voting, and petitions.

The draft Agreement does not cite any basis for the Board's authority to delegate its statutorily assigned election duties to the Recorder, a constitutionally distinct county officer. *See* Ariz. Const. art. XII, §§ 3, 4. Nor does the draft Agreement cite any authority for the Board and Recorder to enlarge the Recorder's powers beyond what the Legislature has prescribed. *See Nutt v. Priser*, 50 Ariz. 71, 75 (1937) (holding the county recorder could not "assume power not conferred by statute"). Although Title 11 permits intergovernmental agreements, that does not "authorize any public agency to exercise any power or engage in any business or enterprise that such public agency is not authorized to exercise or engage in pursuant to other provisions of law." A.R.S. § 11-954.¹

If you are aware of legal authority for the draft Agreement, please promptly provide it to us. If you do not represent the Board with respect to this matter, please let us know to whom we should direct our correspondence.

Sincerely,

/s/ Joshua D. Bendor

Joshua D. Bendor
Solicitor General

cc: Cochise County Board of Supervisors
Christine J. Roberts

¹ Additionally, we are concerned that shifting the Board's elections responsibilities to the Recorder would have the effect of shielding important decisions from public view, contrary to the purpose of open meeting laws. *See* A.R.S. § 38-431.01 et seq.