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AZ CORP COMMISSION
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Andrew J. McGuire (AZ Bar No. 016653)
Carolyn K. Oberholtzer (AZ Bar No. 021877)

BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE
APPLICATION OF WILHOIT WATER
COMPANY FOR APPROVAL OF THE
SALE OF THE ASSETS AND
CANCELLATION OF A PORTION OF
ITS CERTIFICATE OF CONVENIENCE
AND NECESSITY.

DOCKET NO.: W-0²065A-03-0490
MEMORANDUM

Pursuant to Administrative Law Judge Amanda Pope's order at the hearing on December 1, 2003, the City of Avondale (the "City") submits this Memorandum on the issue of whether the enactment of ARIZ. REV. STAT. § 9-404 overruled prior Arizona case law establishing the merger doctrine.

I. Factual Background.

The City desires to purchase the portion of the Wilhoit Water Company (the "Company") servicing residents of the Glen Arm Farms neighborhood in Avondale, Arizona. The Company's system servicing Glen Arm Farms has tax liens attached to it which have been sold to the State of Arizona in the form of certificates of purchase.

1 Those certificates of purchase, dating back to 1978, have not since been redeemed by the
2 State in a foreclosure sale.

3 **II. Legal Analysis.**

4
5 Until such time that an Arizona court determines the constitutionality of ARIZ.
6 REV. STAT. § 9-404, the statute appears to have overruled prior case law establishing the
7 merger doctrine. Under the merger doctrine, as adopted by the Arizona Supreme Court in
8 *State ex. rel. Peterson v. Maricopa County*, 38 Ariz. 347, 300 P. 175 (1931) and then
9 reaffirmed and extended to municipalities by the Arizona Court of Appeals in *City of*
10 *Eloy v. Pinal County*, 158 Ariz. 198, 761 P.2d 1102 (App. 1988), preexisting liens on
11 property acquired by a municipality are merged into the municipality's title and are
12 extinguished. The public policy supporting the merger doctrine is found in Article 9,
13 Section 2, of the Arizona Constitution, exempting all federal, state, county and municipal
14 property from taxation. *See City of Eloy*, 158 Ariz. at 201, 761 P.2d at 1105. State
15 property is exempt from taxation because it is futile for a state to tax "its own property in
16 order to produce the funds with which to operate its own affairs." *Id.* As the court
17 explained in *City of Eloy*, this "rationale for exempting state property from the levy of
18 taxes led the courts . . . to conclude that property acquired by the state becomes freed of
19 liabilities for taxes previously assessed and unpaid." *Id.*, 158 Ariz. at 201, 761 P.2d at
20 1105.
21
22

23 ARIZ. REV. STAT. § 9-404 was enacted in 1999 and set forth that, after December
24 31, 1998, tax liens on property acquired by municipalities cannot be discharged or abated
25

1 by operation of the merger doctrine. See Senate Fact Sheet for SB 1031. However, prior
2 to the enactment of the statute, the Arizona Constitutional provision giving rise to the
3 merger doctrine had not been amended, nor had the public policy reasons given by the
4 Arizona Supreme Court supporting the doctrine been altered. To date, the same is true.
5 Because the State Supreme Court "has the power of final decision as to the meaning of
6 the State Constitution . . ." *Menderson v. City of Phoenix*, 51 Ariz. 280, 288, 76 P.2d
7 321, 324 (1938), the constitutional validity of ARIZ. REV. STAT. § 9-404 is questionable
8 as it subjects municipal property to taxation contrary to the rule set forth by the Arizona
9 Supreme Court in *Peterson*. In light of the case law established by the *Peterson* and
10 *City of Eloy* cases, a court may hold that ARIZ. REV. STAT. § 9-404 violates Article 9,
11 Section 2 of the Arizona Constitution.
12

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14 DATED: 12/8/03

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16 JORDEN BISCHOFF MCGUIRE & ROSE, P.L.C.

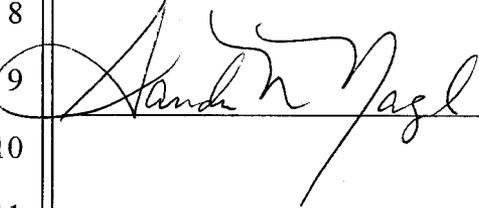
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22 COPY of the foregoing mailed/delivered
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