STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL

HECTOR H. BALDERAS
ATTORNEY GENERAL

December 1, 2022,

The Honorable Nathan P. Small
Representative D-Doña Ana, District 36 PO
Box 697
Doña Ana, New Mexico 88032 Email:
Nathan.small@nmlegis.gov

Re: Opinion Request – Public Funding for Private Roads

Dear Representative Small:

You requested our opinion regarding whether and under what circumstances public funds may be spent on the rehabilitation or maintenance of private roads for public welfare purposes. As discussed in more detail below, we conclude that Article IX, Section 14, of the New Mexico Constitution (the "Anti-donation Clause") generally prohibits such spending unless the private roads are freely available for public use.

Background

During its 2018 legislative session, the state legislature adopted House Memorial 62, wherein it requested an Attorney General opinion "on whether, and in what circumstance, the constitution of New Mexico allows public money to be used for the rehabilitation or maintenance of a private road for public welfare purposes." H.M. 62, 53rd Leg. Sess. (N.M. 2018) ("H.M. 62"). As explained in H.M. 62, "numerous private housing developments outside of municipal jurisdictions" have been constructed in New Mexico. *Id.* And, in some cases "the roads to these developments have deteriorated, or are at risk of deteriorating to the point where they pose a hazard to public welfare, including the health and education of local residents and the economy of the community." *Id.*[1]

[1] The following analysis does not apply to private roads which have been officially dedicated for public use, as provided by Section 47-6-5, because upon the county's official acceptance of dedication, the road becomes a public highway pursuant to Section 67-2-1. In that case, public funds could unquestionably be used to maintain the road (despite the fact that the county is not legally required to maintain it).

Analysis

We begin our analysis by outlining the law surrounding public highways and private roads. Since before statehood, New Mexico law has stated: "[a]ll roads and highways, *except private roads*, established in pursuance of any law of New Mexico, and roads dedicated to public use, that have not been vacated or abandoned, and such other roads as are recognized and maintained by the corporate authorities of any county in New Mexico, are hereby declared to be public highways." NMSA 1978, § 67-2-1 (1905) (emphasis added). With respect to private roads, New Mexico law provides: "[t]he matter of laying out any private wagon road from the dwelling of any person to any public road and of condemning the lands necessary therefor shall be the same as hereinbefore provided, excepting that the viewers of the same shall only receive compensation for one day's service, and mileage to and from their respective residence; and the petition in such cases need only be signed by such person, and the expense of viewing and surveying such road and the damages that may accrue, to any person by reason of laying out the same, and the expense of opening such road shall be paid by such petitioner." NMSA 1978, § 67-5-21 (1905). Effectively, Section 67-2-1 establishes "three methods of establishing highways: [t]hey must be established in pursuance of some law of the state; or they must be dedicated to public use; or they must be recognized and maintained by the public authorities." *Bd. of Comm'rs of San Miguel Cty. v. Friendly Haven Ranch Co.*, 1927-NMSC-037, ¶ 3, 32 N.M. 342, 257 P. 998, 998. Hence, private roads that are officially "dedicated to public use" may be deemed public highways if the county in which they are located assumes responsibility for their maintenance. *See* § 67-2-1 and § 47-6-5 (providing that "the roads may be accepted for maintenance by the county" after the land is dedicated for public use and the road construction has complied with county standards). *See also McGarry v. Scott*, 2003-NMSC-016, ¶ 14, 134 N.M. 32, 134, 72 P.3d 608, 61 (holding that "the Subdivision Act requires that there must be acceptance of road maintenance obligations by the board of county commissioners").

The only provision of the New Mexico Constitution which is relevant to your opinion request is the Anti-donation Clause of Article IX, Section 14. Speaking broadly, the Anti-donation Clause prohibits public entities from donating public funds to private entities without receiving value in return. *See* N.M. Att'y Gen. Op. No. 12-01 (2012) (observing that government "may not confer something of value to a private entity or individual without receiving something of value in return"). In pertinent part, the Anti-donation Clause states:

> Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation…

N.M. Const. art. IX, § 14.

In interpreting the Anti-donation Clause, courts scrutinize the character of the governmental aid to private entities to determine whether it took on the character or effect of a

donation. *See Village of Deming v. Hosdreg Co.*, 1956-NMSC-111, ¶ 37, 62 N.M. 18, 28, 303 P.2d 920, 927 (holding that violations of the Anti-donation Clause are found when "by reason of its nature and the circumstances surrounding it" government aid takes on the character of a donation in both substance and effect). A donation is defined as "a gift, an allocation or appropriation of something of value, without consideration to a person, association or public or private corporation." *Id.* at ¶ 36 (internal quotation marks omitted). To that end, courts have found the existence of consideration, or some value to the public, as a defining element in Anti-Donation Clause analysis. S*ee State ex rel. Office of State Engineer v. Lewis*, 2007-NMCA-008, ¶ 49, 141 N.M. 1 (observing that consideration "can be a defining element") and *Treloar v. Cty. of Chaves*, 2001-NMCA-074, ¶ 32, 130 N.M. 794, 803, 32 P.3d 803, 812 (holding that a severance provision in a contract between a county hospital and a doctor did not violate the Anti-donation Clause because severance pay qualified as earned and therefore "consideration had been given"). In other words, courts are more likely to find a violation where the public receives little or no value in exchange for its money. *See* N.M. Att'y Gen. Op. No. 75-07 (1975) (observing that "in construing the anti-donation clause, courts are more prone to find a violation when the 'donation' is in the form of an outright cash gift").

Even where a project does benefit the public, the benefit to private entities must be only incidental in order to avoid a violation of the Anti-donation Clause. For example, in *Hutcheson v. Atherton*, 1940-NMSC-001, ¶ 35, 44 N.M. 144, 99 P.2d 462, 472, the New Mexico Supreme Court held that a proposed Bernalillo County bond issue to finance the construction of a public auditorium was a violation of Article IX, Section 14. *Id.* In that case, Bernalillo County was to construct the public auditorium, and lend its own credit, for use by a private corporation in commemorating the 400th anniversary of Francisco Vasquez de Coronado's arrival in New Mexico. *Hutcheson*, 1940-NMSC-001, ¶ 24. Despite its conclusion that this project served "a highly commendable public purpose," the Court emphasized that other private entities also serve public purposes and that fact alone did not end the analysis. *Id.* at ¶ 30. The aid to the corporation, the Court explained, was "not of an incidental or inconsequential nature." *Hutcheson*, 1940-NMSC-001, ¶ 30. Instead, the clear purpose and effect of the project was to benefit the private corporation, and the Court held that the project violated the Anti-Donation Clause. *Id.* at ¶ 37.

While no New Mexico court has addressed the issue of whether the Anti-donation Clause precludes using public funds to maintain private roads, this office previously has addressed whether county road departments may perform road work for various entities, including private persons and non-profit charitable organizations. N.M. Att'y Gen. Op. No. 69-103 (1969). It began by stating that "if the power to do road work for other than county roads is to be implied, it must be from an interpretation of the constitution, the general powers granted to the counties or other statutes." *Id.* With regard to all entities, the opinion stated "it is clear that there is no grant of specific authority for the county to do road work other than for the maintenance of its own roads, highways and bridges." *Id*. Therefore, in the absence of specific authority, the opinion concluded that the county road departments may not perform services for private persons. But with respect to non-profit organizations, it concluded that "the county would have the power to do road work for a charitable institution which was providing for the care of sick and indigent persons without running afoul of the Anti-donation Clause because of

the "provision for the care and maintenance of sick and indigent persons." *Id.*

Other states have also had occasion to consider whether governmental agencies can perform work on private roads without compensation. For example, the Supreme Judicial Court of Maine concluded (in an advisory opinion at the request of the State Legislature) that "maintenance at taxpayer expense of privately owned roads… would be an unconstitutional appropriation of public funds for the benefit of the private property owners." *Opinion of the Justices of the Supreme Judicial Court*, 560 A.2d 552, 555 (Me. 1989). Similarly, other state Attorneys General, in analyzing the same issue under comparable state constitutional provisions, have generally determined that the use of public funds to maintain private roads would be unconstitutional. *See, e.g.*, Ark. Att'y Gen. Op. No. 2014-021 (2014) (noting that "a county judge lacks the discretion to devote county resources to the improvement, repair or maintenance of a private road," with the possible exception of "repair that only incidentally benefits private property"), Tex. Att'y Gen. Op. No. JC-0172 (2000) (concluding that generally "counties are not constitutionally or statutorily authorized to construct or maintain private roads"), and Fl. Att'y Gen. Op. No. 79-14 (1979) (opining that "[a] municipality may not lawfully expend public funds to repair or maintain privately owned roads or streets" because the use of public moneys "must be for a primarily public purpose, with only incidental or secondary benefit to private interests").

Notwithstanding the general impropriety of using public funds to repair private roads, some states have suggested that where the public has the unfettered right of access, this conclusion might change. The Tennessee Office of the Attorney General, for example, has opined that the "maintenance of roads *used by the public* is a public purpose, even if the roads are privately owned." Tenn. Op. Atty. Gen. No. 13-32 (2013) (emphasis added). In such a case, the primary purpose of the project would be to benefit the public, and the "mere fact that some private interest may derive an incidental benefit from the activity does not deprive the activity of its public nature." *Id.* This same caveat to the general rule was suggested by the advisory opinion of the Supreme Judicial Court of Maine (mentioned earlier), which framed the factual circumstances before the court as "private roads from which the public is or may be barred" and noted that there was no apparent legal right for the public to use the private roads at issue. *Opinion of the Justices of the Supreme Judicial Court*, 560 A.2d at 555.

On balance, we believe public funds may still be used to repair private roads, consistent with the Anti-donation Clause, provided the general public has unfettered access and the right of travel. *See Hutcheson*, 1940-NMSC-001, ¶ 30. In such a case, the public's free access to and use of the private road means that the project would primarily serve a public purpose, even if it did result in an incidental benefit to private entities.[2] We also note that this conclusion is consistent with the approach seemingly taken by a number of other states.

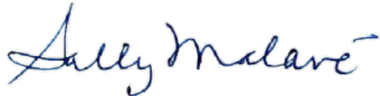
Your request to us was for a formal Attorney General's opinion on the matters discussed

---

[2] However, we pause to caution that this is not to say that all such projects would necessarily be permitted by the New Mexico Constitution. It is possible that in cases where the evidence shows that the road is used exclusively or almost exclusively by its private owners, a court might conclude that the benefit to the public is minimal, and the project would run afoul of the Anti-donation Clause despite public right of access.

above. Such an opinion would be a public document, available to the general public. Although we are providing our legal advice in the form of a letter rather than an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide this letter to the public.

Sincerely,



Sally Malavé
Assistant Attorney General
Director, Open Government Division