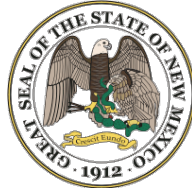


STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY



GENERAL

HECTOR H. BALDERAS
ATTORNEY GENERAL

December 1, 2022

Raúl Burciaga, Director
New Mexico Legislative Council Service
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Santa Fe, New Mexico 87505
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Re: Opinion Request – Allocation of Capital Outlay Funds to Solace Crisis Treatment Center

Dear Director Burciaga:

Former State Representative Jim R. Trujillo requested our opinion regarding the State Legislature’s 2013 allocation of \$214,000 to the Solace Crisis Treatment Center (formerly the Santa Fe Rape Crisis Center) (the “Center”) under which the City of Santa Fe would act as fiduciary agent regarding such funds. While Representative Trujillo’s request did not specify a question to be answered by our office, we examined the issues presented the lens of the Anti-donation Clause of the New Mexico Constitution. It was Representative Trujillo’s understanding that prior to disbursement of the allocated funds, the Center would have to up their building as collateral for the capital outlay funds, and that the title of such building would have to be transferred to the City of Santa Fe prior to disbursement of the funds. We enclose a copy of Representative Trujillo’s request for your ready reference.

The Anti-donation Clause

As you are well aware, Article IX, Section 14 of the New Mexico Constitution provides, in relevant part, that “[n]either 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.” The Anti-donation Clause generally operates as a bar to government funding or aid that operates as a gift to private entities. *See* N.M. Atty. Gen. Advisory Letter to Honorable Mary Kay Papen, New Mexico State Senate (Mar. 30, 2011) (explaining that, “By its terms, the clause prohibits the state, counties,

school districts and municipalities from giving public money or property to a private party without adequate consideration in exchange.”).

Both New Mexico courts and this Office have consistently stated that, “[t]here is no public benefit or public purpose exception to the anti-donation clause.” N.M. Att’y Gen. Op. No. 87-33 (1987). In *Harrington v. Atteberry*, 1915-NMSC-058, ¶ 5, the Supreme Court recognized the challenged project’s benefit to the public but then stated that, “if this were the criterion by which the validity of an appropriation of public funds is to be measured, there would be hardly any limit upon the right of the state, county, city, or school districts to appropriate money to a private corporation.” *Id.* Although the Supreme Court later cast some doubt as to whether this language was controlling, see *Hutcheson v. Atherton*, 1940-NMSC-001, ¶ 27, it subsequently articulated virtually the same premise years later. See *State ex rel. Mechem v. Hannah*, 1957-NMSC-065, ¶ 39 (recognizing that state aid “was a wonderful thing for the livestock industry . . . thus benefitting the economy of the state, but if the appropriation now before us be upheld where will it stop?”). Thus, it appears to be well-settled that, for the purposes of the Anti-donation Clause, “it is immaterial that the donation is made to an individual or corporation serving a public purpose.” N.M. Att’y Gen. Op. No. 89-22 (1989).

Our Supreme Court previously has held that Article IX, Section 14 is implicated only in cases where, “by reason of its nature and the circumstances surrounding it,” government funding or aid takes on the character of a donation in substance and effect. *Village of Deming v. Hosdreg Co.*, 1956-NMSC-111, ¶ 37. Similarly, we have observed in the past that government “may not confer something of value to a private entity or individual without receiving something of value in return.” N.M. Att’y Gen. Op. No. 12-01 (2012). Consideration, or value in return, is perhaps the definitive factor in determining whether a violation of the Anti-donation Clause has occurred. See *State ex rel. Office of State Eng’r v. Lewis*, 2007-NMCA-008, ¶ 49 (stating that, “Consideration for the allocation can be a defining element.”).

Analysis

In light of this authority, a nonprofit such as the Center may, without violating the Anti-donation Clause, receive government funding so long as the funding government entity receives adequate consideration in exchange. Accordingly, the Center could enter into a personal services contract with the City of Santa Fe, whereby the Center’s provision of public services could serve as adequate consideration for receipt of the government funding. See N.M. Atty. Gen. Advisory Letter to Shawn Lerch, Miners’ Colfax Medical Center (June 22, 2015) (concluding that, consistent with the Anti-Donaton Clause, where physician’s agreement to remain in community and provide services constitutes adequate consideration, the Miners Colfax Medical Center could pay a physician a “longevity bonus” specified by contract). Such an arrangement, wherein the Center would provide public services as consideration for the government funding, would not run afoul of the Anti-donation Clause.

In contrast, the Anti-donation Clause does not permit the allocation of government funds solely for the purpose of capital improvements, such as repairs or renovation, to a privately owned building. That scenario is in violation of the Anti-donation Clause to the extent the government entity is not receiving anything of value in exchange for the disbursed funds. Under these circumstances, the disbursement of funds solely for the purpose of capital improvements to the Center's building takes on the nature of a donation in violation of the Anti-donation Clause. *See Lewis, 2007-NMCA-008, ¶ 49.*

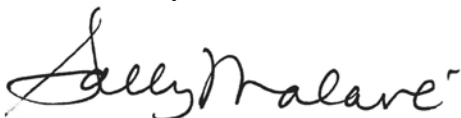
It appears to have been Representative Trujillo's understanding that the Center would transfer the title to its building to the City of Santa Fe prior to disbursement of the funds. If the City of Santa Fe held title to, i.e. owned, the Center's building, then a disbursement of funds for the purpose of repairs and renovation to that building would not run afoul of the Anti-donation Clause. In that scenario, the City of Santa Fe would merely be paying for capital improvements to its own property rather than improperly donating funds to a private entity such as the Center. It is not clear from his letter, however, whether the title to the Center's building was ever transferred. To comply with the Anti-donation clause, the City of Santa Fe would have to own the Center's building *prior* to the disbursement of the funds for capital improvements to such building.

Following this reasoning, it is further our opinion that the original \$214,000 legislative allocation to the Center, as described in your letter, likely violated the Anti-donation clause to the extent such funds were allocated solely for capital improvements to the Center's building, and if, at the time of allocation, the City of Santa Fe did not own the Center's building. The allocation of funds for capital improvements to a private entity's building is a donation in violation of the Anti-donation clause, as the state receives no consideration for its expenditure. *See id.*

Without specific facts at hand, we otherwise express no opinion on Representative Trujillo's general statement that, "the State Legislature has allocated capital outlay funds to nonprofits provided a governmental agency acts as fiscal agent for the funds."

Representative Trujillo requested a formal Attorney General's opinion on the matters discussed above. This opinion is a public document, not subject to the attorney-client privilege. Therefore, we may provide this letter to the public.

Sincerely,



Sally Malavé
Director, Open Government Division

Enclosure as stated