

**November 13, 2018 Advisory Letter — Opinion Request – Purchase of Water Rights under the Local Economic Development Act**

Representative Miguel P. Garcia  
New Mexico House of Representative  
1118 La Font Road, S.W.  
Albuquerque, NM 87105

**Re:** Opinion Request – Purchase of Water Rights under the Local Economic Development Act

Dear Representative Garcia:

You have asked for our advice regarding whether it is permissible for a municipality to purchase water rights with funds provided by the state under the Local Economic Development Act, NMSA 1978, ch. 5, art. 10 (1993, as amended through 2018) (“LEDA”). We understand that your question arises from an agreement between the New Mexico Economic Development Department and the Village of Los Lunas, under which the state will provide funding for the acquisition of consumptive use water rights and the equivalency in water credits for a Facebook data center project in Los Lunas. As discussed in more detail below, we conclude that a municipality may not use public money to acquire water rights for an economic development project authorized by LEDA.

As a preliminary matter, there are two rules of statutory construction that guide our analysis. First, the goal in construing a statute is to give primary effect to legislative intent, as evidenced primarily through the statute’s language. See *Souter v. Ancae Heating and Air Conditioning*, 2002-NMCA-078, ¶ 13. In New Mexico, the legislature directs “[t]he text of a statute or rule is the primary, essential source of its meaning.” NMSA 1978, § 12–2A–19 (1997). Second, we give statutory language its ordinary and plain meaning unless the legislature indicates a different interpretation is necessary. See *Cooper v. Chevron*, 2002-NMSC-020, ¶ 16.

The Anti-Donation Clause prohibits the state, a county, school district, or municipality from “mak[ing] any donation to or in aid of any person, association or public or private corporation,” with certain exceptions. N.M. Const. art. IX, § 14. Among the exceptions to the Clause’s prohibition is Subsection D, which states, in pertinent part:

Nothing in this section prohibits the state or a county or municipality from creating new job opportunities by providing *land, buildings or infrastructure* for facilities to support new or expanding businesses if this assistance is granted pursuant to general implementing legislation that is approved by a majority vote of those elected to each house of the legislature. The implementing legislation shall

include adequate safeguards to protect public money or other resources used for the purposes authorized in this subsection.

(Emphasis added.)

LEDA was enacted to implement Article IX, Section 14(D). Among LEDA's purposes is "to allow public support of economic development to foster, promote and enhance local economic development efforts while continuing to protect against the unauthorized use of public money and other public resources." NMSA 1978 § 5-10-2(B). LEDA authorizes a local government to provide public support for "economic development projects" permitted by Article IX, Section 14(D). *Id.* § 5-10-4(A). LEDA defines "economic development project," in pertinent part, as:

the provision of direct or indirect assistance to a qualifying entity by a local or regional government and includes the purchase, lease, grant, construction, reconstruction, improvement or other acquisition or conveyance of *land, buildings or other infrastructure*; ... the provision of direct loans or grants for *land, buildings or infrastructure*; ... [and] loan guarantees securing the cost of *land, buildings or infrastructure*....

*Id.* § 5-10-2(E). LEDA does not define the terms "land," "buildings," and "infrastructure." Water rights are not considered "land" or "buildings," as those terms are commonly understood.<sup>1</sup> Consequently, we focus on the term "infrastructure" to determine whether it might include the acquisition of water rights.

Looking first to its ordinary meaning, the dictionary definition of "infrastructure," is: "[t]he underlying framework of a system; especially, public services and facilities (such as highways, schools, bridges, sewers, and water systems) needed to support commerce as well as economic and residential development." Black's Law Dictionary (10<sup>th</sup> ed. 2014). Under this definition, the term "infrastructure" does not include the acquisition of water rights.

We next turn our attention to other statutes to see whether we are able discern a legislative intent, custom or practice supporting the inclusion of "water rights" within the term "infrastructure." Based on statutes pertaining to infrastructure in other contexts, it appears that, while the legislature may permit the acquisition of water rights for or in connection with infrastructure, it generally does not consider the acquisition of water rights to be infrastructure. For example, as used in the Public Improvement District Act, "public *infrastructure* purpose" means, among other things, "acquiring interests in real property or water rights *for* public infrastructure, including interests of an owner. See NMSA 1978, § 5-11-2 (emphasis added). As used in the Affordable Housing Act, "*infrastructure* purpose" includes "acquiring interests in real property or water rights *for* infrastructure, including interests of the owner, see NMSA 1978, § 6-27-3 (emphasis added). Similarly, in the Lower Rio Grande Public Water Works Authority Act, the legislature transferred to the Authority "all functions, appropriations, money, records and equipment and all personal property and real property, including *water rights*,

easements, permits and *infrastructure*, ..." NMSA 1978, § 73-26-1 (emphasis added). While these statutes do not define "infrastructure," they refer to water rights separately from infrastructure. The legislature's apparent practice of distinguishing between water rights and infrastructure is consistent with the general understanding that the term "infrastructure" does not include water rights or the acquisition of water rights.

As discussed above, Article IX, Section 14(D) of the New Mexico Constitution, as implemented by LEDA, permits the use of public money to provide or fund "land, buildings or infrastructure" for certain economic development projects. As commonly understood and used by the legislature, the terms "land, buildings or infrastructure" do not include water rights or the acquisition of water rights. Absent any indication that the legislature intended a different meaning of the term "infrastructure" for purposes of LEDA, we conclude that the acquisition of water rights is not included among the permissible uses of public money under LEDA or the constitution. This means that current law precludes a municipality from using public money to purchase or fund water rights for an economic development project under LEDA.

Your request to us was for a formal Attorney General's Opinion on the matters discussed 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 instead of 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 copies of this letter to the public.

Sincerely,

Sally Malavé,  
Assistant Attorney General

[1] The New Mexico Supreme Court has made clear that water rights are separate from land rights, except in the case of irrigation. See *Walker v. U.S.*, 2007-NMSC-038, ¶ 40.