

**October 31, 2017 Advisory Letter — Opinion Request – Housing Infrastructure
and the Anti-Donation Clause**

Doug Moore, Chair
Colonias Infrastructure Board
c/o New Mexico Finance Authority
2017 Shelby Street
Santa Fe, NM 87501

RE: Opinion Request – Housing Infrastructure and the Anti-Donation Clause

Dear Mr. Moore:

You requested our advice regarding whether the Anti-Donation Clause of the New Mexico Constitution applies to housing infrastructure projects financed by the Colonias Infrastructure Board (“Board”) and the New Mexico Finance Authority (“NMFA”). Specifically, you discussed the affordable housing exception to the Anti-Donation clause, N.M. Const. art. IX, § 14(E), and whether the Board or NMFA can grant funds to counties or municipalities “to then be granted on to private entities in order to provide infrastructure to the homes of low income residents of the colonias.” As discussed below, we conclude that the Anti-Donation clause is not implicated where the Board and NMFA are providing financial assistance to counties and municipalities because they are political subdivisions of the state. We further conclude that upon receipt of these funds, counties and municipalities may then provide the funds for housing infrastructure projects so long as they conform to requirements of the Affordable Housing Act and the New Mexico Constitution.

The Colonias Infrastructure Act, NMSA 1978, Sections 6-30-1 to -8 (2010) (the “Act”), created the Board for the purpose of providing funding for infrastructure in colonias, which are defined in the Act as a rural community with a population of twenty-five thousand or less located within one hundred fifty miles of the United States-Mexico border that:

- (1) has been designated as a colonia by the municipality or county in which it is located because of a:
 - (a) lack of potable water supply;
 - (b) lack of adequate sewage systems; or
 - (c) lack of decent, safe and sanitary housing.
- (2) has been in existence as a colonia prior to November 1990; and

- (3) has submitted appropriate documentation to the board to substantiate the conditions of this subsection, including documentation that supports the designation of the municipality or county.

See Section 6-30-3(C). The Act further provides specific legislative findings related to colonias and describes the powers of the Board, including evaluating applications by qualified entities for colonias infrastructure projects. Qualified entities are defined as “a county, municipality or other entity recognized as a political subdivision of the state[.]” Section 6-30-3(F). The Act authorizes the Board to evaluate and prioritize qualified projects that are to be provided financial assistance by NMFA. Such projects are defined under the Act to include “a water system, a wastewater system, solid waste disposal facilities, flood and drainage control, roads or housing infrastructure.” Section 6-30-3(G).

The Anti-Donation Clause of the New Mexico Constitution provides, in 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 . . . except as provided in . . . this section.” N.M. Const. art. IX, § 14. The Board and NMFA do not violate the Anti-Donation Clause by providing these infrastructure grants to counties and municipalities, even if the grant money is subsequently provided to a private entity, because the financial assistance is being transferred from the Board, an agency of the state, to another political subdivision of the state. See *City of Gallup v. New Mexico State Park and Recreation Commission*, 1974-NMSC-084, ¶ 13, 86 N.M. 745, 527 P.2d 786 (the New Mexico Supreme Court held that the prohibitions of Article IX, Section 14 “are not applicable to a legislatively sanctioned donation by the State or one of its governmental agencies to another such agency”); *Wiggs v. City of Albuquerque*, 1952-NMSC-013, 56 N.M. 214, 242 P.2d 865. See also N.M. Att’y Gen. Op. 81-27 (internal citation omitted) (“[T]he prohibitions of Article IX, Section 14 have been held to be inapplicable to ‘donations’ between the state or one of its governmental agencies to another such agency.”); N.M. Att’y Gen. Op. 86-23 (“Intragovernmental transfers (between one subordinate governmental agency to another), are outside the constitutional prohibition.”).

The Board and NMFA are required to comply with any applicable laws regarding the financing of qualified projects, including any restrictions placed upon that funding. For example, NMSA 1978, Section 7-27-12.5 (2015), authorizes the State Board of Finance to issue severance tax bonds allocated for use by the Board to fund colonias infrastructure projects and states how those bonds shall be issued and sold. Executive Order 2013-006 states that “intended end-users of some state-funded projects are private entities necessitating that such projects receive extra scrutiny and oversight to avoid unconstitutional donations of public capital to private entities.” Where this executive order applies, the Board and NMFA are required to follow it, including the requirement that a grantee of state capital outlay appropriations meet certain audit requirements before receiving funding. A qualified entity then, once it receives financial assistance from the Board, is required to comply with all applicable laws, procedures

established by the Board and NMFA, and all terms and conditions of financial assistance from the Board including any repayment obligations.

The Board and NMFA may provide financial assistance to those entities permitted to receive funding; because the qualified entities are, by definition, political subdivisions of the state, the Anti-Donation Clause does not prohibit the Board from providing them financial assistance. However, the Board does not have the authority to provide funds directly to private entities. This does not prohibit a *qualified entity* from providing those funds to a *private entity* so long as it meets the requirements of an exception under the Anti-Donation Clause, such as the sick and indigent or affordable housing exceptions. In this instance, the affordable housing exception to the Anti-Donation Clause provides authorization for the state, counties, and municipalities to finance “infrastructure necessary to support affordable housing projects.” N.M. Const. art. IX, § 14(E)(3). Under subsection F of the Anti-Donation Clause, this provision is not self-executing, but rather requires the legislature to create enabling legislation, which it did in the form of the Affordable Housing Act, NMSA 1978, Sections 6-27-1 to -9 (2004, as amended through 2015).

The Affordable Housing Act provides that the state, counties, and municipalities may “provide or pay the costs of financing or infrastructure necessary to support affordable housing projects[.]” Section 6-27-5(C). It defines infrastructure improvement to include “water systems for domestic purposes and sewage systems, as well as transport and dispersal[.]” Section 6-27-3(H)(3). Though the Colonias Infrastructure Act does not specifically reference the affordable housing exception, the similar language regarding infrastructure in both the Affordable Housing Act and the Colonias Infrastructure Act, along with the expressed legislative purposes of these acts, establishes that qualified projects likely would be permissible under the Affordable Housing Act as well. As such, when a county or municipality is a qualified entity and awarded financial assistance by the Board for a qualified project, the entity, under the Affordable Housing Act, could then donate or pay for, among other things, “financing or infrastructure necessary to support affordable housing projects.” Section 6-27-5(C). This would require the *qualified entity* to comply with all requirements and procedures under the Affordable Housing Act, including any rules adopted by the New Mexico Mortgage Finance Authority, should it wish to utilize this exception. A qualified entity utilizing this provision would need to ensure that it meets all statutory and constitutional requirements and, in doing so, would not violate the Anti-Donation Clause by providing financial assistance authorized under the Constitution and the Act.

We conclude that the Anti-Donation Clause is not implicated when the Board provides financial assistance to a qualified entity under the Colonias Infrastructure Act, even if, as discussed here, the funds are subsequently provided to a private entity, because the qualified entity is political subdivision of the state. The qualified entity must follow the requirements of the affordable housing exception to the Anti-Donation Clause and the Affordable Housing Act should it wish to grant funding to a private entity for developing colonias infrastructure.

You requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with our legal advice in the form of an advisory letter instead of a formal 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 and will post it to the Office of the Attorney General's website. If we may be of further assistance, or if you have any questions regarding this opinion, please contact our office.

Respectfully,

Joseph M. Dworak
Assistant Attorney General