

Opinion No. 04-04

August 13, 2004

OPINION OF: PATRICIA A. MADRID, Attorney General

BY: Elizabeth A. Glenn Assistant Attorney General

TO: The Honorable Rory Ogle State Representative 2500 Algodones, NE Albuquerque, NM 87112-1809

CC: The Honorable Ben D. Altamirano, State Senator Chair, Legislative Finance Committee 1123 Santa Rita Street Silver City, NM 88061 Rhonda Faught, Secretary New Mexico Department of Transportation P.O. Box 1149 Santa Fe, NM 87504-1149

QUESTION

May the New Mexico Department of Transportation (“NMDOT”) use money from the State Road Fund to purchase a passenger plane for general use by the state?

CONCLUSION

The New Mexico Department of Transportation may not use money in the State Road Fund to purchase a passenger airplane for general use by state government agencies, officials and employees.

FACTS

In May 2004, the State Transportation Commission authorized a budget adjustment request to the State Budget Division of the Department of Finance and Administration that proposed transferring \$4 million from the State Road Fund to the Department’s Aviation Division. See BAR #29, New Mexico Department of Transportation, 2004-2004 Fiscal Year (May 19, 2004). The purpose of BAR #29 was to “provide assistance to the General Services Department in the replacement of an aging state aircraft due to maintenance and safety concerns.” The airplane will be used to “transport government officials within, but not limited to, the State of New Mexico,” and “by State of New Mexico agencies, commissions, institutions and employees as allowed by law.” NMDOT Request for Proposals, p. 4 (July 16, 2004).

NMDOT has issued a Request for Proposals (“RFP”) for the airplane and we understand that two finalists have been selected. According to the RFP, the contract for the acquisition of the airplane may be awarded as soon as August 16, 2004. Once the airplane is purchased, NMDOT plans to transfer it to the General Services Department (“GSD”) under a Memorandum of Understanding. The State Aircraft Act requires that all state airplanes used primarily to transport passengers be consolidated in and owned by GSD. See NMSA 1978, §§ 15-9-2, 15-9-3.

DISCUSSION

By statute, the State Transportation Commission “has charge of all policy matters pertaining to the expenditure of the state road fund in the construction, improvement and maintenance of state highways and bridges in the state.” NMSA 1978, § 67-3-14(A) (emphasis added). Thus, the Commission has broad discretion to determine how State Road Fund money should be spent, but that discretion applies only to expenditures for the construction, improvement and maintenance of state highways and bridges.

The State Road Fund “is created within the state treasury, to which shall be credited all receipts authorized by law to be paid into it...” NMSA 1978, § 67-3-65 (1980). A substantial amount of the distributions to the Fund must be used for “maintenance, construction and improvement of state transportation projects[,] ... to meet federal allotments under the federal-aid road laws,” and to pay principal and interest on certain state transportation revenue bonds. § 67-3-65.1.1 In addition to the uses specified in Section 67-3-65.1, the Legislature has authorized various other permissible uses for State Road Fund money. See, e.g., NMSA 1978, §§ 67-3-12(D) (authorizing the Commission to pay attorneys it hires out of the State Road Fund), 67-3-54 to -56 (authorizing the use of State Road Fund to pay for flight strips, airport and access roads necessary to war effort and constructed under agreements with federal government); 67-3-63 (authorizing use of State Road Fund for construction and maintenance of footpaths, bicycle lanes and bridle paths). 2

The governing statutes thus do not appear to authorize NMDOT to use the State Road Fund to purchase an airplane that will be used by the state to transport government officials and employees. This purchase is not included under any of the statutory provisions authorizing the use of State Road Fund money for specific purposes. It also does not relate to the “construction, improvement and maintenance of state highways and bridges in the state” under Section 67-3-14(A) or to the “maintenance, construction and improvement of state transportation projects” under Section 67-3-65.1.

In particular, the term “state transportation project” in Section 67-3-65.1 cannot reasonably be stretched to encompass the purchase of an airplane for the use of state government generally to transport passengers. A state transportation project necessarily must fall within NMDOT’s statutory powers, which relate to the construction, improvement and maintenance of state highways and bridges. See Regents of Univ. of N.M. v. New Mexico Fed’n of Teachers, 125 N.M. 401, 411, 962 P.2d 1236 (1998) (rules of statutory construction require that entire statute be construed as a whole so that all the provisions will be considered in relation to one another). Nothing in the statutes governing NMDOT projects suggests that the legislature intended to authorize projects involving the purchase of a passenger airplane for the purposes described by NMDOT. See Bettini v. City of Las Vegas, 82 N.M. 633, 635, 485 P.2d 967 (1971) (under doctrine of expressio unius est exclusio alterius, where legislature provides authority to do a particular thing and the mode of doing it, the legislature did not intend to include other modes). Absent express or implied statutory authorization, the purchase would amount to an improper usurpation by the executive of the legislature’s

constitutional power to appropriate and control the use of appropriated funds. See N.M. Art. III, § 1 (mandating separation of powers among executive, legislative and judicial departments of government); State ex rel. Schwartz v. Johnson, 120 N.M. 820, 821, 907 P.2d 1001 (1995) (“absent a proper delegation of authority from the state legislature, the executive branch is precluded from exercising any control over the expenditure of appropriated money in a manner that would affect the legislature’s choice of purpose”).

Aside from their plain meaning, the statutes describing the expenditures permitted from the Fund cannot fairly be interpreted to justify NMDOT’s use of the Fund to purchase a passenger airplane. There are no reported New Mexico cases construing the restrictions on the use of the State Road Fund. Courts in other states with road funds or comparable funds have interpreted the statutory and constitutional provisions governing the use of those funds, although the language of those provisions varies substantially from state to state and is subject to different degrees of judicial scrutiny. See, e.g., Newman v. Hjelle, 133 N.W.2d 549 (N.D. 1965) (broad interpretation of North Dakota constitutional provision limiting use of revenue to “construction, reconstruction, repair and maintenance of public highways” allowed expenditures to control billboards and advertising adjacent to highway rights of way); Rogers v. Lane County, 771 P.2d 254 (Or. 1989) (narrow construction of Oregon constitutional provision limiting use of highway fund to “the construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets and roadside rest areas” precluded fund’s use for construction of a parking lot and covered walkway at a municipal airport). Nevertheless, we did not find any case or other legal authority supporting the use of state funds dedicated by law to the maintenance, construction and improvement of public highway projects for purposes unrelated to those projects, such as the passenger plane described by NMDOT.³

If permitted, the purchase of the passenger airplane as proposed by NMDOT could open the door to future misuse of funds for unauthorized purposes by NMDOT and other agencies and commissions. As discussed above, the New Mexico Constitution grants the legislature plenary control over state spending through the appropriation process. State agencies should not be permitted to use the budget adjustment process and interagency agreements in order to spend state funds in a manner not intended or authorized by the legislature. As a result, given the circumstances present here, we conclude that the purchase of the plane would be illegal, and any contract for such a purchase would be void. The executive branch should therefore seek appropriate action from the legislature at the next session in order to proceed lawfully.

[1] Distributions subject to the restriction in Section 67-3-65.1 are “receipts attributable to the taxes, surtaxes, fees, penalties and interest” imposed under the Gasoline Tax Act, the Special Fuels Supplier Tax Act and the Alternative Fuel Tax Act, and certain motor vehicle fees, including driver’s license fees. See NMSA 1978, §§ 7-1-6.10, 66-6-23 to -23.1.

[2] The opinion request asks whether money otherwise needed to pay principal and interest on bonds issued by NMDOT has been improperly diverted to pay for the

airplane. We are not addressing that issue at this time because we do not have sufficient facts to form a definitive conclusion.

[3] The opinion request suggests that the purchase of an airplane with unbudgeted funds might also violate Article IV, Section 30 of the New Mexico Constitution, which provides that “money shall be paid out of the treasury only upon appropriations made by the legislature.” In the General Appropriations Act of 2003, the legislature authorized state agencies, including NMDOT, to request increases in expenditures beyond the amount of their specific appropriations for fiscal year 2004. See 2003 N.M. Laws, ch. 76, § 10(D). We need not separately address whether this proposed expenditure is consistent with Article IV, Section 30 since under current law the State Road Fund simply may not legally be tapped to purchase a passenger airplane for the reasons discussed in the text.