

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

October 21, 2019

The Honorable Mary Kay Papen
New Mexico State Senator
904 Conway Avenue
Las Cruces, New Mexico 88005

The Honorable John Arthur Smith
New Mexico State Senator
P. O. Box 998
Deming, New Mexico 88031

Re: Opinion regarding administration of residential Property Assessed Clean Energy (PACE) financing loans

Dear Senator Papen and Senator Smith:

You requested our opinion regarding the administration of private sector, residential Property Assessed Clean Energy ("PACE") loans by the Doña Ana County Treasurer.[1] Specifically, you asked:

1. Is it legal for a New Mexico county to require a county treasurer to levy and enforce a special assessment used to repay loans made by private financial institutions?
2. Does House Bill 440 enacted during the 2019 legislative session ("HB 440") allow New Mexico counties to require that PACE loans assume a superior position to first mortgages, secondary home equity lines of credit, or other traditional residential financing mechanisms?
3. Are any residential renewable energy system installers in Doña Ana County engaged in predatory and deceptive business practices?
4. Have any Doña Ana County residents unwittingly become a party to federal or state renewable energy tax credit fraud as a result of purchasing residential renewable energy systems?

As discussed in detail below, based on our examination of New Mexico constitutional authority and on the relevant statutory schemes, namely the Solar Energy Improvement Special Assessment Act, NMSA 1978, ch. 4, art. 55C (2009, as amended through 2019) ("SEISA Act") and the Renewable Energy Financing District Act, NMSA 1978, Sections 5-18-1 to -13 (2009) ("REFD Act"), we conclude:

1. Yes. A county may levy and enforce a solar energy improvement special assessment used to repay loans by private financial institutions under the SEISA Act. A county treasurer who levies and collects the special assessment funds would not run afoul of the Anti-donation Clause.

2. Since it was enacted in 2009, the SEISA Act has provided that a solar energy improvement special assessment shall be levied and collected in the same manner as property taxes, constitute a lien on an assessed property, and have priority co-equal with other property tax liens. Those provisions were not affected by HB 440's amendments to the SEISA Act.

The REFD Act does not contemplate the use of PACE loans as a financing procedure for renewable energy improvements. Rather, the REFD Act contemplates the use of bonds issued by a renewable energy financing district. A renewable energy special assessment used to finance such bonds constitute a lien on the property, which lien shall have priority over all other liens except liens for ad valorem property taxes.

3. At this time, the Office of the Attorney General is not aware of any specific business practices alleged to have been committed by a specific residential renewable energy system installer. Thus, we cannot offer an opinion as to whether any residential renewable energy system installers in Doña Ana County engaged in predatory and deceptive business practices.

4. Because our office is not privy to the tax circumstances of individual residents, and because you have not identified any specific renewable energy tax credits nor any specific tax actions taken by specific residents, our office cannot offer an opinion as to whether any Doña Ana County residents have unwittingly become a party to federal or state renewable energy tax credit fraud.

Background

The New Mexico Legislature enacted the SEISA Act and REFD Act in 2009 to enable alternative financing for solar energy improvements and renewable energy improvements. While both the SEISA Act and REFD Act were based on the common goal of facilitating alternative financing for New Mexico property owners to implement energy improvements, the statutes established distinct schemes as to eligible types of improvements and methods of financing.

The SEISA Act

The SEISA Act, enacted by HB 572 in 2009, permits a board of county commissioners ("Board") to provide by ordinance for a solar energy improvement special assessment on a residential or commercial property within the boundaries of the applicable county if the owner of the property requests the assessment. *See* NMSA 1978, § 4-55C-3. Upon enactment of such an ordinance, the Board shall direct the county treasurer to include the solar energy improvement special assessment in the property tax bill for property subject to the assessment and to collect the assessment at the same time and in the same manner as property taxes are levied and collected. *See* NMSA 1978, § 4-55C-4.

For the Board to be able to impose the solar energy improvement assessment, among other requirements, the property owner must submit an application requesting the assessment, and the property owner must submit a certification that the improvements: are eligible solar energy improvements (as defined by the SEISA Act); comply with guidelines for photovoltaic or solar thermal systems established by the energy, minerals and natural resources department ("EMNRD"); and will be installed in compliance with guidelines established by the EMNRD for

installation of photovoltaic or solar thermal systems. *See id.* Further, the property owner must submit documentation of the proposed financing agreement for the solar energy improvements. *See* NMSA 1978, § 4-55C-4(D). Such documentation must establish, among other requirements that the financing will be provided by an entity that has been certified by the Financial Institutions Division of the Regulation and Licensing Department as a solar energy improvement financing institution per Section 4-55C-7 of the SEISA Act. *Id.*

The SEISA Act requires that the solar energy improvement special assessment be in the amount necessary to finance the eligible solar energy improvements, including payment of principal, interest and administrative fees collected by the county, provided that the administrative fees shall not exceed ten percent of the total financing amount. *See* NMSA 1978, § 4-55C-5(A). The solar energy improvement special assessment shall be levied and collected at the same time and in the same manner as property taxes are levied and collected. *See* NMSA 1978, § 4-55C-5(B). Money derived from the imposition and collection of the solar energy improvement special assessment shall be kept separately from other county funds. *Id.* A solar energy improvement special assessment shall constitute a lien on the property, which shall be effective during the period in which the assessment is imposed and shall have priority co-equal with other property tax liens. *See* NMSA 1978, § 4-55C-5(C).

Under the SEISA Act, the proceeds from a solar energy improvement special assessment on a property shall be disbursed by the county treasurer solely for the purpose of financing the solar energy improvements to that property and paying the applicable administrative fees to the county. *See* NMSA 1978, § 4-55C-6(A). The county treasurer shall enter into an agreement with the solar energy improvement financing institution providing financing to the property owner specifying the procedures by which the treasurer shall transfer the revenue from the assessment to the institution. *See* NMSA 1978, § 4-55C-6(B). The agreement with the solar energy improvement financing institution shall specify that the county is not liable in any way for the debt of the property owner, is not a third-party obligor and is not pledging or lending its credit to the property owner or the financing institution. *Id.*

In 2019, HB 440 amended the SEISA Act to permit a Board to contract with a third party to assist with the planning and administration of the solar energy improvement special assessment pursuant to the SEISA Act. *See* NMSA 1978, § 4-55C-9.

The REFD Act

The REFD Act, enacted by SB 647 in 2009, is intended to encourage the development of distributed generation renewable energy sources and the installation by property owners of such energy sources. *See* NMSA 1978, § 5-18-2. To that end, the REFD Act authorizes the use of alternative financing procedures to promote the installation of such improvements and permits the creation and administration of renewable energy financing districts. *Id.*

The REFD Act authorizes a governing body of a municipality or county to form a district for the purpose of encouraging, accommodating and financing renewable energy improvements on property within the municipality or county. *See* NMSA 1978, § 5-18-4. A district shall include only property for which an owner executes an agreement consenting to the inclusion of the

property within the district and to the imposition of a special assessment on the property for the purpose of financing renewable energy improvements. *Id.* “Renewable energy improvements” is defined as a “photovoltaic, solar thermal, geothermal or wind energy system permanently installed on real property.” *See* NMSA 1978, § 5-18-3(I).

To create a district pursuant to the REFD Act, a governing body must adopt a resolution declaring its intent to form a district. *See* NMSA 1978, § 5-18-5. Among other requirements, the resolution must state: a description of the specific types of renewable energy improvements that will be eligible for the financing provided pursuant to the REFD Act; that the inclusion of property in the district will result in the imposition of special assessments on the property to pay the costs of the approved renewable energy improvements, financing and administrative fees; and the method of calculating the amount of the special assessment and the manner of collection of the special assessment. *Id.* Subsequent to such resolution by the governing body, the governing body must hold a hearing on the formation of a district. *Id.*

Pursuant to the REFD Act, if, upon hearing, the governing body determines that the district should be formed, it shall adopt an ordinance ordering that the district be formed and identifying the method by which property owners can execute agreements to have their property included in the district. *See* NMSA 1978, § 5-18-6. The ordinance shall state that the district will be governed by a district board consisting of members of the governing body, or upon determination of the governing body, five directors appointed by the governing body. *Id.* Subsequent to the formation of the district, property may be included in the district by execution of an agreement by the owner of the property and the district board, agreeing to the inclusion of the property and the imposition of a special assessment on the property, and the district board shall adopt a resolution to this effect. *Id.*

Upon formation of a district, the REFD Act authorizes the district board to impose a special assessment on property within the district to facilitate the financing of renewable energy improvements to the property. *See* NMSA 1978, § 5-18-7. The special assessment shall be sufficient in the case of each property to pay the costs of the financing of the renewable energy improvements, including the costs of bond issuance, debt service and administrative costs of the district and the municipality or county in which the district is located. *Id.* The special assessment shall be levied and collected at the same time and in the same manner as property taxes are levied and collected, except to the extent that the district board has provided for other imposition and collection procedures. *Id.* Money derived from the imposition of the special assessment shall be kept separately from other funds of the governing body. *Id.* A special assessment shall constitute a lien on the property, which shall be effective during the period in which the assessment is imposed and shall have priority over all other liens except liens for ad valorem property taxes. *Id.*

As to the financing procedure for renewable energy improvements, the REFD authorizes a district to issue one or more series of bonds to provide money for renewable energy improvements to property in the district, and the bonds may be payable from the special assessments levied pursuant to one or more assessment resolutions. *See* NMSA 1978, § 5-18-8(A). Such bonds shall be made payable as to both principal and interest solely from revenues of the district. *See* NMSA 1978, § 5-18-8(B). No holder of special assessment bonds issued pursuant to the REFD Act may compel any exercise of the taxing power of the district, municipality or county to pay the bonds or the

interest on the bonds. *See* NMSA 1978, § 5-18-8(C). Special assessment bonds issued pursuant to the REFD Act are not a debt or general obligation of the county or the municipality in which the district is located, nor is the payment of special assessment bonds enforceable out of any money other than the revenue pledged to the payment of the bonds. *Id.* A district created pursuant to the REFD Act may be dissolved by the district board by a resolution of the district board upon determination that the district has no outstanding bond obligations. *See* NMSA 1978, § 5-18-13.

Analysis

Pursuant to the SEISA Act, a county treasurer may collect funds in the form of a solar energy improvement special assessment and remit such funds to a financing institution without violating the Anti-donation Clause.

You inquired if it is legal for a New Mexico county to require a county treasurer to “administer, enforce, collect, and lien on behalf of a private, for-profit business.” Your letter further provided the context that “the Doña Ana County Commission will shortly be voting on a proposed ordinance that will require the Doña Ana Treasurer to administer private sector, residential PACE (Property Assessed Clean Energy Financing) loans obtained by county residents and ensure that those loans are superior to any others, including first mortgages or secondary lines of credit.” You additionally expressed the concern that the Doña Ana County Treasurer may believe that requiring a county treasurer to administer a private sector loan program is unconstitutional under state anti-donation restrictions.

In light of the facts you provided and the statutory schemes discussed above, we construe your inquiry to ask whether it is permissible for a county treasurer to administer and collect funds in the form of a solar energy improvement special assessment and disburse those funds to financing institutions, such as those financing the aforementioned residential PACE loans. That scenario is permissible if, pursuant to the SEISA Act, the county has provided by ordinance for a solar energy improvement special assessment to be imposed on a residential or commercial property within the county if the owner of the property requests the assessment. *See* NMSA 1978, § 4-55C-3. Further, under this scenario, among other requirements, the financing institution at issue must be certified in compliance with the SEISA Act (*see* NMSA 1978, §§ 4-55C-4(D)(1) and 4-55C-7) and the financed improvements must be eligible solar energy improvements as defined by the SEISA Act (*see* NMSA 1978, § 4-55C-4(C)(1)).

Regarding the constitutional concern you raised, we do not believe the actions by a county treasurer in collecting and disbursing funds in the form of solar energy improvement special assessments pursuant to the SEISA Act would run afoul of the state constitution’s Anti-donation Clause. The Anti-donation Clause provides, in pertinent part, “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. A “donation,” for purposes of the Anti-donation Clause, is “a gift, an allocation or appropriation of something of value, without consideration.” *Vill. of Deming v. Hosdreg Co.*, 1956-NMSC-111, ¶ 36, 62 N.M. 18 (internal quotation marks omitted). As previously opined by our office, New Mexico courts have found a violation of the Anti-donation Clause when a state or local government has made outright gifts of money or property,

or has effectively relieved private persons and entities from obligations that they would otherwise have to meet. *See* Att’y Gen. Advisory Letter to Senator Ortiz y Pino dated January 22, 2016 (citing *Chronis v. State ex rel. Rodriguez*, 1983-NMSC-081, 100 N.M. 342 and *City of Clovis v. Southwestern Pub. Serv. Co.*, 1945-NMSC-030, 49 N.M. 270). Thus, an Anti-donation Clause violation occurs when there has been an outright gift of money or property to a private entity with no exchange of adequate consideration. *Id.*

Under the scheme established by the SEISA Act, neither a county nor a county treasurer would be lending or pledging the county’s credit or making a donation to a property owner or a financing institution. The SEISA Act contemplates that a property owner seeking to make solar energy improvements would enter into a financing agreement with a certified financing institution (*see* NMSA 1978, § 4-55C-4(D)(1)). The costs of such solar energy improvements, including payment of principal and interest, would be paid by the property owner through the collection of the solar energy improvement special assessment. *See* NMSA 1978, § 4-55C-5. Although the county treasurer collects the solar energy improvement special assessment and disburses the proceeds to the financing institution providing the financing for the solar energy improvements, the county is not liable in any way for the debt of the property owner, is not a third party obligor and is not pledging or lending its credit to the property owner or the financing institution. *See* NMSA 1978, § 4-55C-6.

In addition, the SEISA Act provides for payment of the county’s costs from levying and collecting solar energy improvement special assessments and disbursing the funds to certified financing institutions. Under the SEISA Act, the special assessment must account for the administrative fees collected by the county, provided that the administrative fees shall not exceed ten percent of the total financing amount. *See* NMSA 1978, § 4-55C-5. In other words, the SEISA Act contemplates that a county treasurer would collect solar energy improvement special assessments from a property owner and disburse such funds, less the county’s administrative costs, to the applicable certified financing institution.[2]

According to the New Mexico Supreme Court, the Anti-donation Clause “permits ‘incidental aid or resultant benefit to a private corporation or other named recipients’ unless the aid or benefit ‘by reason of its nature and the circumstances surrounding it, take on character as a donation in substance and effect.’” *Moses v. Ruszkowski*, 2019-NMSC-003, ¶ 50 (quoting *Vill. of Deming*, 1956-NMSC-111, ¶¶ 34, 37). The primary purpose of the solar energy improvement special assessment is “to increase access to the benefits of solar technology improvements” by “facilitat[ing] financing arrangements for the eligible solar energy improvements.” NMSA 1978, § 4-55C-3(C). As discussed above, the solar energy improvement assessment program authorized by the SEISA Act does not involve a donation to private individuals or entities. Any benefit to financial institutions participating in the special assessment program is incidental or indirect, and, under New Mexico judicial precedent, permitted by the Anti-donation Clause. *See Moses*, 2019-NMSC-003, ¶ 51 (state textbook loan program which provided for loaning secular textbooks to students attending private schools did not violate the Anti-donation Clause).

In view of the foregoing, a county treasurer levying and collecting solar energy improvement special assessments and disbursing such funds to a certified financing institution pursuant to the SEISA Act would not violate the Anti-donation Clause.

Our opinion above as to the constitutionality of a county treasurer levying and collecting special assessments and disbursing the proceeds from same to a financing institution, such as one providing PACE loan financing, is limited to the context of solar energy improvement special assessments per the SEISA Act. This is important to note because, in the course of reviewing your inquiry, it came to our attention that the proposed Doña Ana County ordinance referenced by your letter appears to provide for direct private lending to property owners for the purpose of financing eligible renewable energy improvements, and cites as its enabling authority the REFD Act. The ordinance does not reference or purport to rely on the SEISA Act.

Per the background provided above, the SEISA Act provides for financing agreements as between property owners and certified financing institutions for the purpose of financing solar energy improvements. *See* NMSA 1978, § 4-55C-4. In contrast, the REFD Act does *not* contain a similar provision for financing agreements as between property owners and financing institutions for the purpose of financing renewable energy improvements. *See* NMSA 1978, § 5-18-1 et seq. Rather, the only financing mechanism contemplated by the REFD Act is the issuance of bonds by a renewable energy financing district. *See* NMSA 178, § 5-18-8.

Thus, to the extent your letter references private, direct lending to property owners through PACE loans, and to the extent the proposed Doña Ana County ordinance relies on such direct lending, such a proposed scenario would appear to conflict with the legislative intent of the REFD Act. It is our opinion that the REFD Act does not authorize a county to implement or administer direct lending as between property owners and financing institutions for the purpose of financing renewable energy improvements. *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).

Special assessments imposed pursuant to the SEISA Act or REFD Act constitute liens that assume priority over first mortgages or other traditional residential financing mechanisms.

You inquired whether HB 440 allows New Mexico counties “to require that PACE loans assume a superior position to first mortgages, secondary home lines of credit, or other traditional residential financing mechanisms.” As detailed previously above, HB 440 was a 2019 amendment to the SEISA Act. HB 440 did not alter the pre-existing lien priority as originally embodied by the SEISA Act in 2009.

The SEISA Act provides that a solar energy improvement special assessment shall constitute a lien on the property, which lien shall have priority co-equal with other property tax liens. *See* NMCA 1978, § 4-55C-5(C). Thus, under the SEISA Act, liens created by the solar energy improvement assessments contemplated by a PACE loan would have priority over first mortgages, secondary home lines of credit, or other traditional residential financing mechanisms. It is worth noting that the liens created by the solar energy improvement assessments contemplated by a PACE loan, as well as the priority status of such liens, arise by operation of the SEISA Act. No additional action by New Mexico counties is required to prioritize such liens over traditional residential financing mechanisms. The priority arises by default under the SEISA Act upon imposition of the solar energy improvement special assessment.

Per our previous analysis above, the REFD Act, in contrast to the SEISA Act, does not contemplate the use of direct to property owner PACE loans as a financing procedure, or renewable energy improvements. Rather, the REFD Act only contemplates the use of bonds issued by the renewable energy financing district. To the extent a renewable energy special assessment is used to finance such bonds, such renewable energy special assessment shall constitute a lien on the property, which lien shall have priority over all other liens except liens for ad valorem property taxes. *See* NMCA 1978, § 5-18-7. Therefore, in the case of renewable energy special assessments imposed pursuant to the REFD Act, such renewable energy special assessments would assume priority over first mortgages, secondary home lines of credit, or other traditional residential financing mechanisms.

We are unable to offer an opinion as to whether any residential renewable energy system installers in Doña Ana County engaged in predatory and deceptive business practices without specific facts.

You inquired if there are any residential renewable energy system installers in Doña Ana County engaged in predatory and deceptive business practices. However, the letter did not identify any residential renewable energy system installers in Doña Ana County and did not identify specific business practices alleged to have been committed by any such installers. Without specific facts, our office cannot offer an opinion as to whether any residential renewable energy system installers in Doña Ana County engaged in predatory and deceptive business practices. Such installers would be subject to the New Mexico Unfair Practices Act, as well as any applicable regulatory or licensing requirements. As such, the Office of the Attorney General remains concerned about these allegations and will review any specific claims received.

We are unable to offer an opinion as to whether any Doña Ana County residents have unwittingly become a party to federal or state renewable energy tax credit fraud as a result of purchasing residential renewable energy systems without specific facts.

You inquired if any Doña Ana County residents have unwittingly become party to federal or state renewable energy tax credit fraud as a result of purchasing residential renewable energy systems. The letter did not identify any specific renewable energy tax credit and did not specify any tax actions taken by specific residents. Further, our office is not privy to the tax circumstances of individual residents. The Office of the Attorney General remains concerned about these allegations and will work with the appropriate jurisdictional entities to review any specific claims received.

Conclusion

The SEISA Act permits a county treasurer to levy and collect solar energy improvement special assessments without violating the Anti-donation Clause, even where solar energy improvements are financed through private PACE loans, provided the requirements of the SEISA Act are met. The REFD Act does not authorize the use of PACE loans to the extent such loans are direct to property owner lending. The REFD Act explicitly refers to renewable energy district bonds and is silent as to other financing procedures for renewable energy improvements.

Under the SEISA Act and REFD Act, liens created by special assessments meeting the Acts' requirements assume priority over first mortgages or other traditional residential financing mechanisms.

While we cannot offer an opinion as to whether residential renewable energy installers in Doña Ana County are engaged in predatory and deceptive business practices or whether any Doña Ana County residents have unwittingly become party to federal or state renewable energy tax credit fraud as a result of purchasing renewable energy systems, the Office of the Attorney General feels that additional safeguards shall be put in place to protect consumers.

You requested a formal opinion on the matters discussed above. This opinion is a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public. If this office may be of further assistance, or if you have any questions regarding this opinion, please contact our office.

Sincerely,



Karla J. Soloria
Assistant Attorney General

Cc: Nelson J. Goodin, Doña Ana County Attorney

[1] Although your letter requesting an opinion initially referred to HB 440, which was a 2019 amendment to the SEISA Act, further correspondence from your office clarified that you wanted us to consider SB 647 in our opinion. SB 647 was the 2009 legislation codified as the REFD Act. Accordingly, both the SEISA Act and REFD Act statutory schemes are discussed herein.

[2] HB 440 amended the SEISA Act to permit a board of county commissioners to contract with a third party to assist with the planning and administration of the solar energy improvement special assessment.