December 11, 2007 County Regional Spaceport Gross Receipts Tax

The Honorable Joni Marie Gutierrez
New Mexico State Representative
P.O. Box 842
Mesilla, NM 88046

Re: Opinion Request – County Regional Spaceport Gross Receipts Tax

Dear Representative Gutierrez:

You requested our advice regarding the collection of Doña Ana County's regional spaceport gross receipts tax. We understand that your request stems from Doña Ana County's enactment of the tax, the proceeds of which are to be distributed, in part, to a regional spaceport district. No regional spaceport district exists at this time, but the Taxation and Revenue Department ("TRD") is required, by law, to begin enforcing and collecting the tax on January 1, 2008. *See* NMSA 1978, § 7-20E-3(B). Based on these circumstances, you ask:

1.   Must the collection of Doña Ana County's regional spaceport gross receipts tax begin on January 1, 2008 even though no regional spaceport district will exist at that time to receive the tax proceeds?

2.   May TRD defer enforcement of Doña Ana County's tax ordinance until a regional spaceport district is formed?

As discussed in more detail below, we conclude that the county regional spaceport gross receipts tax may not be imposed, collected or enforced absent the formation of a regional spaceport district to which the proceeds of the tax can be allocated.

The Regional Spaceport District Act ("RSD Act") was enacted in 2006. *See* 2006 N.M. Laws, ch. 15, §§ 1-13, codified at NMSA 1978, 5-16-1 to -13 (2006). The Act's express purposes include: "allow[ing] multi-jurisdictional cooperation in the creation of a southwest regional spaceport" and "foster[ing] tourism in the cities and counties comprising the district." NMSA 1978, § 5-16-2(B), (D).

Section 5-16-4 of the RSD Act governs the creation of a regional spaceport district. It provides, in pertinent part, that "[a] combination may create a regional spaceport district by contract." NMSA 1978, § 5-16-4(A). A "combination" is "two or more governmental units that exercise joint authority." NMSA 1978, § 5-16-3(D). For purposes of the Act, a "governmental unit" that may join a combination is "the state, a county or a municipality of the state or an Indian nation, tribe or pueblo located within the boundaries of the state."

Before entering into a contract establishing a district, a governmental unit must hold "at least three public hearings." NMSA 1978, § 5-16-4(C). Copies of the contract, the

district's bylaws and operating procedures are filed with the Spaceport Authority, which issues a certificate to the district. NMSA 1978, § 5-16-4(A). Once certified by the Spaceport Authority, the district "shall constitute a separate political subdivision of the state…." *Id.*

The RSD Act provides that a regional spaceport district "has no direct taxation authority." NMSA 1978, § 5-16-9. Revenue for a district is generated under Section 5-16-13, which provides: "Each governmental unit *that is a county or municipality and is a member of a combination* shall have enacted a municipal regional spaceport gross receipts tax or a county regional spaceport gross receipts tax prior to December 31, 2008" (emphasis added). Section 5-16-13 goes on to require that at least 75% of tax revenues received by the governmental unit "be used by the district for the financing, planning, designing, engineering and construction of a regional spaceport" and that no more than 25% of the revenues may be used by the governmental unit "for spaceport-related projects."

Under Section 5-16-13, a county, such as Doña Ana County, is not required to enact a county regional spaceport gross receipts tax unless it is also a member of a combination. A combination, under the Act, consists of two or more governmental units that contract to create a regional spaceport district. This indicates that before a county or municipality enacts a regional spaceport gross receipts tax, it will have agreed with other governmental units to create a district. Section 5-16-13 clearly contemplates that the district will have been created by time the county begins receiving revenues from the tax.

The same law enacting the RSD Act added a new section to the County Local Option Gross Receipts Taxes Act that governs the imposition of the county regional spaceport gross receipts tax. *See* 2006 N.M. Laws, ch. 15, § 15, codified at NMSA 1978, § 7-20E-25.[1] The new section created an ambiguity in the law that apparently led Doña Ana County to adopt the county regional spaceport gross receipts tax even though no regional spaceport district had been created. Specifically, the first sentence of Section 7-20E-25(A) provides:

> A majority of the members of the governing body of a county that *desires to become a member of a regional spaceport district* pursuant to the Regional Spaceport District Act shall impose by ordinance an excise tax at a rate not to exceed one-half percent of the gross receipts of a person engaging in business in the district area of the county for the privilege of engaging in business.

(Emphasis added.) The provision evidently was interpreted to require a county to impose the regional spaceport gross receipts tax as a condition to the county's participation in the creation of a district.

When interpreting a statute, the goal is "to determine and give effect to legislative intent." *New Mexico Bd. of Veterinary Medicine v. Reigger*, 2007-NMSC-044, ¶ 11, 164 P.3d 947, 952. Generally, legislative intent is found in the plain language of a statute.

Departure from the plain language is appropriate only when necessary "to resolve an ambiguity, correct a mistake or absurdity, or deal with a conflict between different statutory provisions. *Id. See also State v. Maestas*, 2007-NMSC-001, ¶ 12, 149 P.3d 933, 938 ("[i]f adherence to the plain meaning of a statute would lead to absurdity, we must reject that meaning and construe the statute according to the obvious intent of the legislature").

A statutory provision is not construed in a vacuum, but is considered in the context of the statute as a whole. *See State v. Smith*, 2004-NMSC-032, ¶ 10, 98 P.3d 1022, 1026. "When analyzing a statute from a particular statutory act … we must read the act in its entirety and construe all the provisions together and attempt to view them as a harmonious whole." *Cummings v. X-Ray Assoc. of New Mexico*, P.C., 1996-NMSC-035, ¶ 45, 918 P.2d 1321, 1334.

The RSD Act sets forth the necessary steps to create a district. As described above, Section 5-16-4 of the Act specifies that a combination consisting of one or more governmental units may, after they hold the requisite three public hearings, create a district by contract. The district exists as a political subdivision of the state once it is certified by the Spaceport Authority. Section 5-16-4 does not condition the creation of the district on the enactment of a regional spaceport gross receipts tax by the combination's members.

Section 5-16-13 requires each county or municipality that "is a member of a combination" to enact a regional spaceport gross receipts tax before December 31, 2008. Section 5-16-13 goes on to provide that "[a]t least seventy-five percent of the tax revenues received by the county or municipality "must be used by *the district* for the financing, planning, designing, engineering and construction of a regional spaceport" (emphasis added). The most reasonable interpretation of this language is that, at the time the county and municipal parties to a contract creating a district imposed the regional spaceport gross receipts taxes, the district would exist in order to receive specified allocation of the tax revenues.

The new section of the County Local Option Gross Receipts Tax Act, quoted above, appears to be inconsistent with Section 5-16-133. The first sentence of Section 7-20E-25(A) directs "the governing body of a county that *desires to become a member of a regional spaceport district pursuant to the Regional Spaceport District Act*" to enact the county regional spaceport gross receipts tax. (Emphasis added.) The emphasized language suggests that, contrary to the apparent intent of Section 5-16-13, a county might enact the tax before a district was created.

For several reasons, we do not believe that the emphasized language in the first sentence of Section 7-20E-25(A) must be interpreted to require a county to enact the regional spaceport gross receipts tax before a district exists or can be created. First, the language in question cannot be read in isolation. Except for that language, the other provisions of Section 7-20E-25 appear to be premised on the existence of a district at the time a county enacts the county regional spaceport gross receipts tax. After

referring to a county "that desires to become a member" of a district, the first sentence of Subsection (A) goes on to require imposition of the tax at a rate measured by a specified percentage of the gross receipts of a person engaging in business "in the district area of the county." Under Section 7-20E-25(C), an ordinance imposing the tax "shall not go into effect" without approval of voters in "the district area of the county voting in the election." As used in Section 7-20E-25, the "district area of the county" is the portion of a county "within the boundaries of a regional spaceport district of which the county is a member." NMSA 1978, § 7-20E-25(E).[2] Under these provisions, a county is a member of a district at the time it imposes the regional spaceport gross receipts tax.

Second, because they were included in the same act passed in 2006, Section 7-20E-25 and the RSD Act must be read together. As discussed previously, the RSD Act authorizes a combination of two or more governmental units to create a regional spaceport district by contract, and requires those units that are counties or municipalities to enact a regional spaceport gross receipts tax. After a district is created, the RSD Act allows governmental units adjacent to the district "to join the district and determine the territorial area to become a part of that district." NMSA 1978, § 5-16-12(A). Although it does not readily apply to a county involved in the creation of a district, Section 7-20E-25(A)'s language requiring a county that "desires to become a member" of a district to enact the regional spaceport gross receipts tax makes sense in the context of a county seeking to join an existing district. Possibly, the legislature was focusing only on that context when it drafted Section 7-20E-25(A). *See Hughes v. Timberon Water and Sanitation Dist.*, 1999-NMCA-136, ¶ 17, 991 P.2d 16, 21 (appellate courts have "never blindly assumed that the Legislature writes statutes with exquisite attention to detail"), cert. denied, 128 N.M. 148, 990 P.2d 822 (N.M. 1999); *Jeffrey v. Hays Plumbing & Heating*, 118 N.M. 60, 63, 878 P.2d 1009 (Ct. App. 1994) (when construing statutes, appellate courts "should not attribute to the legislature an undue precision in drafting and thereby frustrate legislative intent").

Third, construing Section 7-20E-25 to require a county to enact and collect revenues from a county regional spaceport tax before a district is created results in absurdity. This is evident from the situation Doña Ana County will face if TRD proceeds to enforce the County's tax ordinance. There is no regional spaceport district to receive the mandatory tax allocation under Section 7-20E-25 when the tax goes into effect on January 1, 2008. If a district is not created, nothing in the law provides for an alternative distribution or refund of tax revenues TRD collects under the tax ordinance. These consequences are at odds not only with the intent behind the RSD Act, but also with the intent of Doña Ana County voters who approved the tax for the express purpose of providing revenue to a regional spaceport district.

Finally, the conflicting provisions of Section 7-20E-25 and the RSD Act can be harmonized and given effect. This is achieved by construing Section 7-20E-25(A)'s reference to a county that "desires to become a member of a district" to apply only to counties that join a district after it has been created. Section 5-16-13 of the RSD Act, which applies to counties that participate in a combination to create a district, requires

those counties to impose the regional spaceport gross receipts tax, but imposition of the tax is not a condition to the creation of a district.

Under our interpretation, which we believe best reflects the legislature's intent, Doña Ana County cannot impose the county regional spaceport gross receipts tax before a regional spaceport district is created under the RSD Act. Because the County enacted the tax prematurely under the law, we conclude that the Taxation and Revenue Department may properly defer enforcement of the tax until a district is created.

If we may be of further assistance, please let us know. 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 you 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,

Gary King for

    ELIZABETH A. GLENN
    Assistant Attorney General

[1] A similar provision governing the imposition of a municipal regional spaceport gross receipts tax was added to Municipal Local Option Gross Receipts Tax Act. *See* 2006 N.M. Laws, ch. 15, § 14.

[2] If a municipality within the district has imposed a municipal regional spaceport gross receipts tax, the "district area of the county" includes only "that portion of a county that is outside the boundaries of a municipality and that is within the boundaries of a regional spaceport district of which the county is a member...." NMSA 1978, § 7-20E-25(E).