

**December 23, 2014 Advisory Letter — Opinion Request – Publicly Funded
Community Meal**

The New P.O. Mesilla Park, NM 88048	Honorable Mexico	Bill State Box	McCamley Representative 458
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Re: Opinion Request – Publicly Funded Community Meal

Dear Representative McCamley:

You have requested an Attorney General opinion regarding Doña Ana County’s (hereinafter “County”) proposal to provide a community meal to citizens with partial funding from the County. Specifically, you would like to know whether this proposal would violate the anti-donation clause of Article IX, Section 14 of the New Mexico Constitution. Based on our examination of the relevant New Mexico constitutional provisions and case law and the information available to us at this time, we believe that this proposal would violate the anti-donation clause.

To summarize the relevant facts, the County would like to use public funds for the purpose of serving a holiday meal to County residents. Before commencing with this project, the County would like to be sure the project would not run afoul of the anti-donation clause of Article IX, Section 14.

The anti-donation clause states, 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. . . .1

The term “donation” has been construed by New Mexico courts according to its “ordinary sense and meaning” as “a gift, an allocation or appropriation of something of value without consideration to a person, association or public or private corporation.” Village of Deming v. Hosdreg Co., 1956-NMSC-111, ¶ 36, 62 N.M. 18, 303 P.2d 920 (internal quotation marks omitted). Any form of state aid having the “character of a donation in substance and effect” violates the anti-donation clause. State ex rel. Office of the State Eng’r v. Lewis, 2007-NMCA-008, ¶ 49, 141 N.M. 1, 150 P.3d 375 (internal quotation marks omitted).

The New Mexico Supreme Court has held that the anti-donation clause places clear prohibitions on the state’s ability to donate public funds to private individuals or corporations even when such donations would facilitate a useful public purpose. For example, in Harrington v. Atteberry, the Court held that a law authorizing the board of county commissioners to annually appropriate funds to a county fair association was in

conflict with the state's anti-donation clause. 1915-NMSC-058, ¶ 6, 21 N.M. 50, 153 P. 1041. While the Court acknowledged the public value in holding a county fair, it also explained that there are limits on the state's ability to donate public funds. The Court explained:

Within the state we have many private corporations engaged in educational work and a still greater number serve some other useful public purpose. . . . If all these individuals and corporations could be given public money to aid them in carrying on the work in which they are engaged, there would practically be no limit upon the various agencies of government in the expenditure of donation of public funds, and the constitutional provision in question would be a vain, useless, absurd, and meaningless aggregation of words and sentences.

Id. ¶ 5. Similarly, in Hutcheson v. Atherton, the New Mexico Supreme Court held that Bernalillo County's pledge of credit to a private corporation in furtherance of a project to commemorate the four hundredth anniversary of Francisco Vasquez de Coronado's arrival in New Mexico violated the anti-donation clause. 1940-NMSC-001, 44 N.M. 144, 99 P.2d 462. Though the Court acknowledged the "highly commendable public purpose" behind the corporation's work, it also noted that "that fact alone [did] not warrant the State or any county or city in making a donation or pledging its credit in aid of it." Id. ¶ 30. The Court explained that the County's donation to the corporation was "direct" and "substantial," and consequently, was a "plain violation" of the anti-donation clause. Id. ¶ 35.

Although there are often commendable uses for public funds, the anti-donation clause places clear limitations on the use of those funds. This office has opined that the state may not use public funds to subsidize or promote private individuals, corporations, or associations. For example, the City of Raton could not spend its lodgers' tax proceeds to fund La Mesa Park racetrack, or to otherwise defray the track's expenses. N.M. Att'y Gen. Op. 88-38 (1988). A state institution may, however, authorize "reasonable expenditures" of public funds for meals and refreshments for members of a public body when they meet to discuss or conduct public business. See N.M. Att'y Gen. Op. 97-02 (1997). An expenditure of public money is permitted under the anti-donation clause so long as it is "demonstrably related to [a state institution's] constitutionally or statutorily authorized functions and [does] not amount to a subsidy of private individuals or businesses." Id. Here, in contrast, the County's proposed expenditure of public funds for a community meal would amount to a public subsidy of private individuals. See Hosdreg Co., 1956-NMSC-111, ¶ 36 (a donation is "an allocation or appropriation of something of value, without consideration"). Although the County's proposed allocation of public funds for a community meal may serve a valuable community purpose, it would violate the anti-donation clause's express prohibition against allocating public funds for a private benefit without consideration.

You have 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 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 general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Respectfully,

Jennifer Salazar
Assistant Attorney General

cc: Jess Williams, Doña Ana County Public Information Officer

[1] The facts provided to us do not suggest that the proposed community meal falls under the anti-donation clause's exemption for the care of sick or indigent persons. See Article IX, Section 14(A).