

January 22, 2016 -- Advisory Letter -- Opinion Request -- Liens on Charter School Improvements

Senator Gerald Ortiz y Pino
New Mexico State Senator
400 12th NW
Albuquerque, NM 87102

Re: Opinion Request – Liens on Charter School Improvements

Dear Senator Ortiz y Pino:

You requested our advice regarding liens on school improvements described in the Charter School Act (“Act”), NMSA 1978, Section 22-26A-5(H) (2015). Specifically, you asked whether the lien on school improvements described in Section 22-26A-5(H) takes first priority over all other liens on the real property, regardless of the date that a school or district makes a qualifying capital improvement on the property. Additionally, you asked whether Section 22-26-5(H) violates the Anti-Donation Clause of Article IX, Section 14, or Article IV, Section 31 of the New Mexico Constitution. Based on our examination of the relevant New Mexico constitutional, statutory and case law authorities, and on the information available to us at this time, we conclude that there is no express first priority provision under Section 22-26A-5(H). We further conclude that Section 22-26A-5(H) does not violate the Anti-Donation Clause nor Article IV, Section 31 of the New Mexico Constitution.

According to your letter, the New Mexico Public Education Department (“NMPED”) has recently changed its interpretation of Section 22-26A-5(H) to require that all lease purchase agreements (“LPAs”) include language granting these liens first priority. It is presumed that NMPED’s position is based on an assumption that all four of the following events will occur: (1) after execution of LPA, the school has made capital improvements on the property using public funds; (2) the LPA is terminated prior to title transferring to the school; (3) the school elects to foreclose on its lien; and (4) the sale proceeds are not sufficient to pay all the superior liens *and* to recover the value of additional improvements made by the school. Thus, NMPED contends that the added value of the capital improvements constitutes an excess benefit to the lessor of the property.

Section 22-26A-5(H) of the Act reads as follows:

Lease purchase arrangements: ...

shall provide that, if state, school district or charter school funds, above those required for lease payments, are used to construct or acquire improvements, the cost of the improvements shall constitute a lien on the real estate in favor of the school district or charter school and then, if the lease purchase arrangement is

terminated prior to the final payment and the release of the security interest or the transfer of title at the option of the school district or charter school:

(1) the school district or charter school may foreclose on the real estate lien; or

(2) the current market value of the building or other real property at the time of termination, as determined by an independent appraisal certified by the taxation and revenue department, in excess of the outstanding principal due under the lease purchase arrangement shall be paid to the school district or charter school....

Emphasis added.

A plain reading of the statute reveals no mention of the priority of school improvement liens. In giving effect to a statute, “the text of a statute or rule is the primary, essential source of its meaning.” NMSA 1978, § 12-2A-19 (1997). When a statute is silent on a matter, the law must give effect to the plain meaning of the statute’s text. *Id.* Unless an intent to do otherwise is clearly manifested, a statute is to be read and given effect as written and words used in that statute are to be given their ordinary and usual meanings. See *Waggoner v. Town of Mesilla*, 2011-NMCA-041, ¶ 12, 149 N.M. 596.

The legislature, in drafting the CSA, did not choose to include a priority provision in Section 22-26A-5(H). The legislature has included priority provisions in other lien statutes, which clearly indicates an intent to include priority provisions. See e.g., NMSA 1978, Section 3-51-24 (1965) (municipal parking liens); NMSA 1978, Section 73-16-16 (1927) (conservancy district liens); NMSA 1978, Section 7-38-48 (2003) (property tax liens). It is contrary to long established statutory construction concepts to imply a priority provision when none is stated in the statute.

Section 22-26A-5(H) provisions with regard to the lien’s priority should be interpreted by its plain language. There is no express first priority provision in the plain language of the statute. Therefore, the lien on school improvements does not take first priority over all other liens on the real property.

The Anti-Donation Clause provides in pertinent part that “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 and donation to or in aid of any person, association or public or private corporation . . .” N.M. Const. Art. IX, §14. 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 have effectively relieved private persons and entities from obligations that would otherwise have to be met. See, *Chronis v. State ex rel. Rodriguez*, 1983-NMSC-081, 100 N.M. 342; *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.

Under the facts presented, when a charter school enters into a LPA, there is no investment to private landlords, there is no assumption of the private landlord's obligations, no gift or subsidy given to the landlord, and the NMPED is in complete control of the allocation of money used for school improvements. In entering into an LPA, a school receives the lion's share of the exchanged consideration in that the Act imposes terms that significantly favor the school. For example, the school is not required to purchase the property and has no obligation to continue the lease from year to year, while the owner is bound to continue in the lease agreement for a period of up to thirty years. Section 22-26A-5. Consideration is also to be found in the fact that the school will have the benefit and value of the use of any improvements for the life of the LPA, to better provide education to New Mexico schoolchildren.

Moreover, because the charter school is entitled to either foreclose on the lien or obtain payment by the property owner of the fair market value of the property less the outstanding principal due under the lease, the charter school always has an option of realizing the fair market value of the capital. Sections 22-26A-5(H)(1) and (2). Whether the value of the school improvements reverts to the landlord is within the school's control. Therefore, a speculative benefit to a private entity is not sufficient to find a violation of the Anti-Donation Clause when governmental services to the public are facilitated or when governmental functions are accomplished.

With regards to the constitutionality of Section 22-26A-5(H), the law presumes that the legislature kept within the bounds fixed by the state's constitution when enacting a statute. See, *State ex rel. Pub. Emp. Ret. Assoc. v. Longacre*, 2002-NMSC-033, ¶ 10, 133 N.M. 20. Whenever possible, statutes must be construed as consistent with the constitution giving effect to the statute, with all doubts resolved in favor of constitutionality. See *City of Raton v. Sproule*, 1967-NMSC-141, ¶ 9, 78 N.M. 138 (a statute will not be declared unconstitutional unless the court is satisfied beyond all reasonable doubt that the legislature went outside the constitution in enacting the challenged legislation).

Article IV, Section 31 of the New Mexico Constitution provides that "[N]o appropriation shall be made for charitable, educational or other benevolent purposes to any person, corporation, association, institution or community, not under the absolute control of the state..." Our understanding is that the legislature does not make appropriations directly to charter schools and school districts. Accordingly, we do not believe that the prohibition in Article IV, Section 31 applies to lease purchase arrangements authorized under Section 22-26A-5.

In cases addressing when a statutory landlord's lien attaches, the New Mexico Supreme Court and Court of Appeals determined that the landlord's lien attaches at the time the tenant signed the lease. See e.g., *Chessport Millworks Inc. v. Solie*, 1974-NMCA-036, ¶ 14, 86 N.M. 265 (Landlord's lien attached on date that lease period began and was superior to subsequently perfected security interest on property); *Gantham v. First Am. Indian Land, Inc.*, 1965-NMSC-003, ¶ 7, 74 N.M. 729 (Landlord's statutory lien attached at beginning of tenancy for rental due or to become due under terms of lease and had

priority over execution lien arising out of judgment recovered against tenants during lease.). In the instance of a landlord's lien, the lien arises by virtue of the tenant acquiring an interest under the lease. The lien attaches upon the tenant's interest in the lease commencing.

Because Section 22-26A-5(H) contemplates that the lien arises "if" capital improvements are made, a school improvement lien arises at the time the funds are secured. The lien attaches on the date the charter school has expended monies to make improvements on the property.

As to priority date of the lien, New Mexico law looks first to the language of the statute creating the lien itself. However, when the statute is silent, the common law doctrine of "first in time, first in right" controls the priorities between the parties. *Kuemmerle v. United New Mexico Bank at Roswell, N.A.*, 1992-NMSC-028, 113 N.M. 677. Therefore, the lien takes priority from the date it is filed or other act done, and it does not take precedence over a prior recorded mortgage or lien, unless so provided by statute. *Eccles v. Will*, 1918-NMSC-020, ¶ 3, 23 N.M. 623. In a scenario under Section 22-26A-5(H), the "other act done" that creates a lien and establishes its priority under the statute is the expenditure of monies. At this time, the lien both attaches and vests with the requisite priority, taken in consideration with pre-existing liens. Only the legislature can enact a law to change this common law doctrine. The pertinent statute cannot be amended by the adoption of an alternate policy.

To summarize, we conclude that the lien on school improvements does not take first priority over all other liens on the real property. A speculative, future and uncertain contingency cannot be the basis for an Anti-Donation Clause violation, especially when adequate consideration is exchanged in the agreement. Additionally, Section 22-26A-5(H) does not conflict with Article IV, Section 31 of the New Mexico Constitution. Of course, in all instances where a charter school enters into a lease purchase arrangement with a private lessor as authorized under Section 22-26A-5(H), the focus should remain on the best interest of students and the educational mission of the school rather than on the personal financial interests of the parties to the arrangement. Upon receiving an appropriation of public funds, administrators and fiduciary should collaborate with proper oversight authority to mitigate waste, fraud and abuse.

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.

Sincerely,

Peter Auh
Deputy Attorney General