January 28, 2008 Property Tax Assessments on Affordable Housing

The Honorable Ben Lujan
Speaker of the House
New Mexico House of Representatives
05 Entrada Celedon y Nestora
Santa Fe, NM 87506

Re: Opinion Request — Property Tax Assessments on Affordable Housing

Dear Representative Lujan:

You have requested an Attorney General's opinion concerning the method of assessing owner-occupied residential housing provided under the County of Santa Fe's affordable housing ordinance (Santa Fe County Ordinance No. 2006-202, hereinafter "County Ordinance"). You ask whether, under New Mexico law, the phrase "market value" may be interpreted to permit a county to assess taxes on affordable housing on the basis of the diminished value of the property that is caused by deed or mortgage restrictions on the amount of appreciation value a homeowner may receive from resale of the home.

We conclude, based on relevant New Mexico constitutional, statutory and case law authorities, and in light of the provisions of the County Ordinance that the proper method of assessment requires a determination of market value using sales of comparable property, without any modification.[1]

The County Ordinance was adopted pursuant to the affordable housing exception to the anti-donation provision of Article IX, Section 14 of the New Mexico Constitution, as implemented by the Affordable Housing Act. Section 18 of the County Ordinance requires the imposition, at the time the affordable housing unit is sold to the first buyer, of an "Affordability" mortgage or lien in favor of the County. The Affordability lien reflects 95 percent of the value of the subsidy being provided by the County (which is the difference between the sales price and the amount paid by that homeowner or financed by a private lender who holds first mortgage position). Under the County Ordinance, that instrument must also contain a right of first refusal in favor of the County (in the event the homeowner wants to sell the home and has received an offer to purchase) to purchase the unit at the then-current fair market value. If the County does not exercise that right within the specified time, the owner may sell the unit to any buyer at an unrestricted price. In such case, however, the "Affordability" lien would have to be satisfied by payment to the County in the amount of the lien, which funding the County may then use to fund additional affordable housing.

In addition, the County Ordinance requires an "Appreciation Share" mortgage or lien, which provides that in the event of sale or refinance within a ten year period, the County will be entitled to payment representing a proportionate amount of the increase in value of the property. The amount owing on an "Appreciation Share" lien decreases at the rate

of 10% per year and is subject to further reduction in the event the sales price is insufficient to satisfy both the "Affordability" and the "Appreciation Share" liens.

Valuation of property subject to these liens, like all other non-exempt property in the state, is subject to the requirements of Article VIII, Section 1 of our Constitution, which requires that "taxes levied upon tangible property shall be in proportion to the value thereof…." That phrase has been interpreted by our courts to require, in general, "the 'reasonable cash market value' reflected by sales of comparable property …be used if there have been such sales." Hardin v. State Tax Commission, 78 N.M. 477, 478, 432 P.2d 833, 834 (1967). That requirement is reflected in the Property Tax Code, which provides, in pertinent part:

> the value of property for property taxation purposes shall be its market value as determined by application of the sales of comparable property, income or cost methods of valuation or any combination of these methods.

NMSA 1978, § 7-36-15(B) (1995). "Market value" means:

> a price which a purchaser, willing but not obliged to buy, would pay an owner, willing but not obliged to sell, taking into consideration all uses to which the property is adapted and might in reason be applied.

Protest of Cobb v. Otero County Assessor, 113 N.M. 251, 253, 824 P.2d 1053, 1055 (Ct. App. 1991, cert. denied at 113 N.M. 44 (1992)).

Under these laws, as they have been interpreted by our courts, it is the price at which an affordable housing unit would sell on the open market, in an arms-length transaction, that is the basis upon which that unit is to be assessed. You express concern that in the affordable housing context, such a value is illusory because the owner can never claim or recoup the value assessed, and question whether there is a rational justification for assessing a property at a value significantly higher than the amount the homeowner would actually receive upon sale, which would cause the homeowner to pay taxes "for a benefit never earned by or conferred on" that individual. The situation you describe, however, is no different than that faced by virtually any homeowner who is financing the purchase of his or her home, regardless of that owner's income level or financial condition.

The Affordability and Appreciation Share lines do not give the County an ownership interest in the property. A mortgage only establishes a lien on legal title; it passes no title to the mortgaged property. See Finch v. Beneficial Finance, 120 N.M.658, 659, 905 P.2d 198, 199 (1995), citing Slemmons v. Massie, 102 N.M. 33, 34, 690 P.2d 1027, 1028 (1984). Under the County Ordinance, the homeowner, upon sale of the unit, is entitled to receive its then-current fair market value—either from the County upon exercise of its first refusal right, or any other buyer. The fact that the funds actually received by the homeowner are subject to reduction based for amounts owing on any first mortgage and the mortgage liens imposed by the County pursuant to its affordable

housing program puts the affordable housing homeowner in the same position as most homeowners upon sale of their residences, when they must pay off liens imposed by their lenders. The fact that the County has chosen to impose an "Appreciation Share" lien, the pay off of which further reduces the net amount due the homeowner, is a policy decision that the County has made--perhaps to prevent "flipping" and/or to encourage the maintenance of the affordable nature of the unit--and appears to have no discernible impact on the price a willing buyer would pay for the unit.

Even though we believe affordable housing units are subject to assessment at market value like any other privately owned residential property, this does not mean there are no further steps a county may take to provide additional relief to homeowners of affordable units. Although there is no legal authority for a county to exempt that housing from such an assessment, under the authority granted it by the affordable housing exception, the Affordable Housing Act, and a properly enacted ordinance consistent with that Act, the County may make funding available to those homeowners to pay those taxes.

The affordable housing exception reads, in pertinent part:

> Nothing in this section prohibits…a county…from:
>
> …
>
> (3) providing or paying the costs of financing…to support affordable housing projects.

N.M. Const., Art. IX, § 14(E) (2006). Consistent with that exception, the Affordable Housing Act (hereinafter "the Act") affirmatively authorizes the county to provide or pay the costs of financing necessary to support affordable housing projects. See NMSA 1978, § 6-27-5(C)(2007). The term "financing" is not defined in either the constitutional exception nor the Act. Principles of statutory construction require that, in the absence of a legislatively supplied definition or other indication of contrary intent, the plain meaning of the words as they appear in the statute control. See Plains Electric Generating and Transmission Cooperative, Inc. v. New Mexico Public Utility Commission, 126 N.M. 152, 156, 967 P.2d 827 (1998). "Financing" has been defined to mean "the act, process, or an instance of raising or providing funds." Webster's Third International Dictionary 851 (Unabridged ed. 1986). Thus, paying property taxes, or some portion thereof, on affordable housing units consistent with the County Ordinance (following amendment to allow for such activity) and state tax laws is within the scope of activities authorized under the exception and the Act.

Further, the legislature could propose, subject to voter approval, an amendment to Article VIII, Section 5 authorizing the legislature to exempt affordable housing units from taxation, much like the head-of-family and veteran exemptions already contained in that Section. There may be other steps the legislature or a county could take, as well,

consistent with the law discussed here and other legal restraints that may be applicable, to address the concerns you have raised.

If we may be of further assistance, please let us know. Your request was for an 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,

MARTHA A. DALY

Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General

[1] You ask a second, follow-up question in the event we conclude that “market value” can be interpreted to mean a value other than the price the property would command if placed on the market. In light of our conclusion concerning the meaning of “market value”, we do not reach your second question. We would, however, direct your attention to the discussion of the Affordable Housing Act and other alternatives in the text, infra at 3-4.