

July 15, 2009 City of Santa Rosa Gross Receipts Tax

The Honorable José A. Campos
New Mexico State Representative
1050 S. 10th Street
Santa Rosa, NM 89435

Re: Opinion Request - City of Santa Rosa Gross Receipts Tax

Dear Representative Campos:

You have requested our opinion regarding whether a public vote would be required for the City of Santa Rosa (“City”) to use revenue from the municipal infrastructure gross receipts tax (“MIGRT”) for the purpose of economic development. As discussed in more detail below, once the City enacts a MIGRT, the governing law does not permit it to change the purpose of the tax by public vote or otherwise. Nevertheless, the City may use revenue generated from the MIGRT for economic development to a limited extent under the Local Economic Development Act, NMSA 1978, §§ 5-10-1 to -13 (as amended through 2007).

In March 2000, the City Council of Santa Rosa approved Ordinance 320 imposing a MIGRT as authorized by Section 7-19D-11 of the Municipal Local Option Gross Receipts Taxes Act, NMSA 1978, ch. 7, art. 19D (as amended through 2007).[1] A special election was held on May 16, 2000 and the voters approved the tax. Ordinance 320 expressly stated that revenue from the tax would be placed in the City’s general fund.

Section 7-19D-11 provides that a municipality may dedicate tax revenue for certain statutorily authorized uses at the time it enacts an ordinance imposing the tax. The permissible uses include “municipal general purposes,” as specified in Ordinance 320, and “furthering or implementing economic development plans and projects.” See NMSA 1978, § 7-19D-11(C)(3), (5). The law distinguishes a MIGRT imposed for economic development purposes from a MIGRT imposed for other authorized purposes by subjecting it to voter approval in all cases:

Any ordinance enacting any increment of the first one-eighth of one percent of the tax is not subject to a referendum of any kind, notwithstanding any requirement of any charter municipality, except that an increment that is imposed after July 1, 1998 for economic development purposes set forth in Paragraph (5) of Subsection C of this section shall be subject to a referendum as provided in Subsection D of this section.

NMSA 1978, § 7-19D-11(A) (emphasis added).

A canon of statutory construction is that when the legislature expressly authorizes a certain thing to be done in a prescribed manner, it can be done only in that manner. See

Bettini v. City of Las Cruces, 82 N.M. 633, 635, 485 P.2d 967 (1971). As discussed above, the City specified at the time it enacted Ordinance 320 that revenues generated by the MIGRT would be placed in the general fund. Once a municipality has enacted a MIGRT for a specified purpose, Section 7-19D-11 does not expressly allow the municipality to amend the original purpose of the tax.[2] Consequently, where, as here, a municipality's governing body decides to change the purpose of an existing MIGRT to furthering or implementing economic development plans and projects, the municipality evidently must repeal the tax, enact a new ordinance imposing the tax for economic development purposes, and hold an election on the question of whether the tax should be imposed under Section 7-19D-11(D).

Although the City may not amend the purposes to which the existing MIGRT revenues are dedicated, it can use those revenues for economic development purposes to a limited extent under the Local Economic Development Act. That Act is enabling legislation implementing the provisions of the 1994 constitutional amendments to Article IX, Section 14 of the New Mexico Constitution.[3] Section 5-10-4(B) of the Act states:

The total amount of public money expended and the value of credit pledged in the fiscal year in which that money is expended by a local government for economic development projects pursuant to Article 9, Section 14 of the constitution of New Mexico and the Local Economic Development Act shall not exceed five percent of the annual general fund expenditures of the local government in that fiscal year.

(Emphasis added.) The five percent limit does not apply to "revenue generated through the imposition of the municipal infrastructure gross receipts tax pursuant to the Municipal Local Option Gross Receipts Taxes Act ... for furthering or implementing economic development plans or projects..." NMSA 1978, § 5-10-4(B)(2). As discussed previously, the City did not impose the MIGRT to further or implement economic development plans or projects. Instead, it imposed the tax, with voter approval, for general municipal purposes. Therefore, the City may use revenue from the MIGRT placed in the general fund for economic development purposes, albeit indirectly, subject to the five percent cap specified in Section 5-10-4(B) of the Local Economic Development Act.

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

MONA VALICENTI
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General

[1] The Municipal Local Option Gross Receipts Taxes Act authorizes municipalities to impose a variety of gross receipts taxes, such as the MIGRT, municipal gross receipts tax, municipal capital outlay gross receipts tax, quality of life gross receipts tax and municipal higher education facilities gross receipts tax.

[2] Compare Section 7-19D-11 with NMSA 1978, § 7-19D-9(C), (D) (2007), which allows a municipality to change the purpose of the municipal gross receipts tax authorized by that section by adopting a subsequent ordinance amending the original purpose and holding an election to approve or disapprove the amendment.

[3] The 1994 amendment to Article IX, Section 14 allows a state, a county or a municipality to “create new job opportunities by providing land, buildings or infrastructure for facilities to support new or expanding businesses pursuant to general implementing legislation....” See N.M. Const. art. IX, § 14(D).