

March 16, 2011 Advisory Letter---Clarification of Previous Advisory Letter

The Honorable Stephen H. Fischmann
New Mexico State Senator
P.O. Box 2580
Mesilla Park, NM 88047

Re: Clarification of Request by Las Cruces Housing Authority

Dear Senator Fischmann:

On behalf of the Housing Authority of the City of Las Cruces, you requested clarification of a previous advisory letter issued by this Office regarding the Housing Authority's statutory powers. See letter from Sally Malavé, Assistant Attorney General to the Honorable Stephen H. Fischmann (July 15, 2010). Specifically, you asked:

1. Can the Housing Authority appropriate funding directly from the legislature, i.e., Capital Outlay Funding?
2. If the Housing Authority can appropriate funding from the legislature, can it act as its own fiscal agent?

As discussed below, the Housing Authority's statutory power to "appropriate money" enables the Authority to allot money in its custody to acquire, construct, operate and maintain housing projects. It does not authorize the Authority to take or obtain money directly from the legislature or to act as fiscal agent with regard to that money.

The Municipal Housing Law, NMSA 1978, ch. 3, art. 45 (1965, as amended through 2009), authorizes a city

by proper resolution of its governing body, to create, as an agent of the city, an authority to be known as the "housing authority" of the city.... The city may delegate to the authority the power to construct, maintain, operate and manage any housing project or affordable housing programs of the city and may delegate to the authority any or all of the powers conferred on the city by the Municipal Housing Law.

Id. § 3-45-5(A). We understand that the City of Las Cruces has duly adopted resolutions creating the Housing Authority as an agent of the City and delegating to it the City's powers under the Municipal Housing Law. See City of Las Cruces Resolution No. 1 (Sept. 25, 1951), City of Las Cruces Resolution No. CC-HA-1 (Nov. 4, 1961) and City of Las Cruces Resolution No. 90-014 (July 17, 1989).

Your questions relate to Section 3-45-4 of the Municipal Housing Law, which, among other things, authorizes a city or a housing authority acting as the city's agent to:

within its area of operation, prepare, carry out, acquire, purchase, lease, construct, reconstruct, improve, alter, extend or repair any housing project or any part of a housing project and operate and maintain the housing project, and for any of those purposes, the governing body of the city [or the authority] may appropriate money and authorize the use of any property of the city.

NMSA 1978, § 3-45-4 (A)(1) (emphasis added).

When read in the context of Section 3-45-4(A)(1), the word “appropriate” means “[t]o prescribe a particular use for particular moneys; to designate or destine a fund or property for a distinct use.” Black’s Law Dictionary 101 (6th ed. 1990). When state legislatures, including New Mexico’s, make appropriations, they “allot, assign, set apart, or apply [money] to a particular use or purpose.”[1] See Holmes v. Olcott, 189 P. 202, 202 (Ore. 1920) (citation omitted). See also Hunt v. Callaghan, 257 P. 648, 649 (Ariz. 1927) (defining an “appropriation” as “the setting aside from the public revenue of a certain sum of money for a specified object...”).

Based on how the term “appropriate money” is used in Section 3-45-4(A)(1), we believe that the legislature intended to give a city or its housing authority the power to allot or designate money already in its possession or custody for the purposes specified in Section 3-45-4(A)(1). We do not believe the term “appropriate money” in this context authorizes or entitles a city or housing authority to demand, receive or obtain money directly from the legislature or any other source.

Of course, the legislature may use its discretion to appropriate money to a housing authority created under the Municipal Housing Law. In addition, Section 3-45-30 of the Law empowers

a city [or a housing authority as the city’s agent] to borrow money or accept contributions, grants or other financial assistance from the state or federal government for, or in aid of, any housing project or affordable housing program within its area of operation and, to these ends, to comply with such conditions, trust indentures, leases or agreements as may be necessary, convenient or desirable.[2]

(Emphasis added.)

Section 3-45-20 clearly authorizes a city or housing authority to accept contributions and other financial assistance from the state and to comply with any corresponding conditions or agreements. However, neither this provision nor any other provision of the Municipal Housing Law requires the state or the legislature to make appropriations or otherwise provide money to a housing authority.

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,

ELIZABETH A. GLENN
Deputy Attorney General

[1] The New Mexico Constitution provides that “money shall be paid out of the treasury only upon appropriations made by the legislature,” and directs that laws “making an appropriation shall distinctly specify the sum appropriated and the object to which it is to be applied.” See N.M. Const. art. IV, § 30.

[2] Section 3-45-20 was amended in 2009. See 2009 N.M. Laws, ch. 226, § 11 (eff. Apr. 7, 2009). Before the amendments, the provision authorized a city (or properly designated housing authority) to borrow money and accept contributions and grants only from the federal government.