

## March 3, 2009 Tax Exemption for Property Leased to a School

The Honorable Edward Sandoval  
New Mexico State Representative  
Chair, House Taxation and Revenue Committee  
State Capitol, Room 316B  
Santa Fe, NM 87501

The Honorable Rick Miera  
New Mexico State Representative  
Chair, House Education Committee  
State Capitol, Room 313B  
Santa Fe, NM 87501

**Re:** Opinion Request -- Tax Exemption for Property Leased to a School

Dear Representatives Sandoval and Miera:

You requested our advice regarding whether the legislature may enact a tax exemption for property leased to a public school district for educational purposes. A bill providing for such an exemption has been introduced during the current legislative session. See House Bill 132, 49th Leg., 1st Sess. (N.M. 2009) (“HB 132”).<sup>[1]</sup> As discussed below, based on judicial opinions and other legal authorities, we conclude that the New Mexico Constitution narrowly defines property that is exempt from state taxation and precludes the legislature from enacting additional property tax exemptions, like that contemplated under HB 132.

We understand that your question stems from the Taxation and Revenue Department’s analysis of HB 132, which noted that the legislature cannot, by statute, exempt from taxation property that is not exempt under the state constitution. See Fiscal Impact Report for HB 132 (last updated on Feb. 6, 2009). The Department stated that the constitution does not exempt property leased by a school district and does not allow a property owner to exempt leased property from taxation based on the tenant’s use of the property. We believe that the Department’s position is essentially correct.

The New Mexico Constitution grants specified tax exemptions based on ownership or use of property. In pertinent part, Article VIII, Section 3 provides that “[t]he property of the United States, the state and all counties, towns, cities and school districts and ... all property used for educational or charitable purposes ... shall be exempt from taxation.” Article VIII, Section 3 authorizes laws providing for “exemptions of personal property from ad valorem taxation,” but only “if approved by a three-fourths majority vote of all the members elected to each house of the legislature.”<sup>[2]</sup> Article VIII, Section 3 does not expressly authorize the legislature to enact tax exemptions for real property beyond those specified in the constitution.

The New Mexico Supreme Court has long held that the constitutional provisions exempting property from taxation are exclusive:

[N]o other property is or can be exempted. The Constitution, in effect, classes tangible property into that exempt from taxation, that which may be exempted, and that which must be taxed.

State ex rel. Attorney General v. State Tax Comm'n, 40 N.M. 299, 58 P.2d 1204, 1206 (1936). Accord Dillard v. New Mexico State Tax Comm'n, 53 N.M. 12, 201 P.2d 345, 349 (1949) (tangible property must be taxed unless the constitution specifically grants or authorizes its exemption). See also N.M. Att'y Gen. Op. No. 69-137 (state constitution "sets forth the only areas of allowable ad valorem tax exemption"); N.M. Att'y Gen. Op. No. 6267 (1955) (the legislature "may neither enlarge nor diminish the exemptions granted in [Art. VIII, § 3]"); N.M. Att'y Gen. Op. No. 2086 (1918) (enumeration of tax exemptions in the state constitution precludes the legislature from enacting additional or other exemptions).

HB 132 exempts from taxation real property leased to a public school district and used for educational purposes. As discussed above, to be permissible, the exemption must be authorized by the constitution. Although Article VIII, Section 3 includes two property tax exemptions relating to public schools and education, neither appears to cover the exemption contemplated under HB 132.

First, Article VIII, Section 3, as quoted above, exempts the "property of" the United States, the state and various political subdivisions, including school districts. Based on its context, the exemption clearly is intended to apply to property owned by school districts and other governmental bodies. Property owned by a third party and leased to a school district is not "property of" the district and would not qualify for the exemption.

Second, Article VIII, Section 3 exempts from taxation "all property used for educational ... purposes." As interpreted by the New Mexico Supreme Court, the applicability of the exemption depends on how the property is used rather than the owner's purposes and objects. See Mountain View Homes, Inc. v. State Tax Comm'n, 77 N.M. 649, 427 P.2d 13 (1967) (use of the property, not the ownership, determines the exemption's applicability); Georgia O'Keeffe Museum v. County of Santa Fe, 2003 NMCA-003, ¶ 40, 133 N.M. 297 (same). By itself, this suggests that HB 132 is consistent with the constitutional exemption because the bill allows an owner to exempt from taxation property leased to a school district and used by the district for educational purposes. However, New Mexico courts have clarified that Article VIII, Section 3's educational or charitable purpose exemption applies only to the owner's use of the property. See Chapman's, Inc. v. Huffman, 90 N.M. 21, 559 P.2d 398 (1975); Rutherford v. County Assessor, 89 N.M. 348, 552 P.2d 479, 481 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976). The use to which a lessee or tenant puts the property is immaterial for purposes the exemption. See Chapman's, 559 P.2d at 398; Rutherford, 552 P.2d at 481 (exemption did not cover hospital's use of leased property as a tenant). As a result, the

owner of property leased to a school district generally could not claim the educational purposes exemption based on the school district's use of the property. [3]

To summarize, the tax exemption HB 132 allows for real property leased to a public school district is not among those provided under Article VIII, Section 3. Accordingly, HB 132 is open to question as an improper attempt to expand the permissible classes of tax exempt property beyond those specified or authorized by the state constitution.

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  
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General

[1] HB 132 would amend the Property Tax Code to exempt from valuation for property tax purposes property that: "1) is leased to a public school district or to a public school ... and 2) is used exclusively for public school educational purposes."

[2] In addition those specified in Article VIII, Section 3, the state constitution provides property tax exemptions for heads of families, veterans and veterans with disabilities. See N.M. Const. art. VIII, §§ 5, 15.

[3] But see Sisters of Charity v. County of Bernalillo, 93 N.M. 42, 596 P.2d 255 (1979) (allowing a lessor to claim charitable purposes exemption where both lessor and lessee were charitable organizations, lessee was a wholly owned subsidiary of the lessor, lease was not intended to generate revenue and lessee used property for same charitable use for which the lessor was created).