

October 8, 2008 Confidentiality of Affidavit Required under NMSA 1978, Section 7-38-12.1

The Honorable Andrew Nuñez
New Mexico State Representative
Box 746
Hatch, NM 87937

Re: Opinion Request – Confidentiality of Affidavit Required under NMSA 1978, Section 7-38-12.1

Dear Representative Nuñez:

You requested our advice regarding the permissible uses of information contained in affidavits filed in connection with real property transfers under Section 7-38-12.1 of the Property Tax Code. In particular, you ask whether county assessors are allowed to use sales information obtained under that provision in official county protest hearings. As discussed in more detail below, it appears that, by statute, the legislature intended to allow the use of sales information obtained under Section 7-38-12.1 in protest hearings.

In pertinent part, Section 7-38-12.1 of the Property Tax Code requires a party to a transfer of residential property to “file with the county assessor ... an affidavit” signed by the property’s transferor or transferee and containing specified information “to be used only for analytical and statistical purposes in the application of appraisal methods....” NMSA 1978, § 7-38-12.1(A), (B)(2005). Among other things, the affidavit must include “the full consideration, including money or any other thing of value, paid or exchanged for the transfer and the terms of the sale including any amount of seller incentives....” Id. § 7-38-12.1(B)(4).

Section 7-38-12.1 requires a county assessor to retain an affidavit as “a permanent, confidential record.” NMSA 1978, § 7-38-12.1(C). It underscores the confidentiality of the affidavits by providing in two places that an affidavit is not a “valuation record.” NMSA 1978, § 7-38-12.1(C), (E). This is significant because valuation records are public records, with certain exceptions not pertinent here. See id. §§ 7-38-4(A)(1), 7-38-19 (1991).

Section 7-38-12.2 imposes criminal penalties for violations of Section 7-38-12.1. A “person subject to Section 7-38-12.1 NMSA 1978 who willfully releases information in violation of that section ... is guilty of a misdemeanor and shall be fined not more than one thousand dollars (\$1,000).” NMSA 1978, § 7-38-12.2(B). Excepted from this penalty provision is information that is disclosed “as provided in Section 7-38-4 NMSA 1978 or as part of a protest proceeding as defined in Section 7-38-24 NMSA 1978....” Id. Section 7-38-4 generally prohibits the disclosure of property taxpayer information, with certain listed exceptions. Section 7-38-24 allows a property owner to protest, among other things, the value or classification determined by the county assessor for property tax purposes. The protest proceeding includes filing a petition with the county assessor and

a hearing on the petition before the County Valuation Protests Board. Id. § 7-38-24(A), (C)(2003).

The primary goal in statutory interpretation is to determine and give effect to the legislature's intent. See Cobb v. State Canvassing Bd., 2006-NMSC-034, ¶ 34, 140 P.3d 498. Generally, if it makes sense as written, the plain language of a statute will control. See State v. Maestas, 2007-NMSC-001, ¶ 9, 149 P.3d 933. However, departure from the plain language may be justified if "necessary to resolve an ambiguity, correct a mistake or an absurdity that the Legislature could not have intended, or to deal with an irreconcilable conflict among statutory provisions." Cobb, 2006-NMSC-034, ¶ 34. In those circumstances, it may be appropriate to consider the history and background of a statute in addition to its text. See State v. Rivera, 2004-NMSC-001, ¶ 13, 82 P.3d 939.

The plain language of Section 7-38-12.2 excepts from the confidentiality requirements of Section 7-38-12.1 information in an affidavit that is released as part of a protest proceeding. This language is consistent with an interpretation allowing county assessors to use sales information obtained under Section 7-38-12.1 in official county protest hearings. Based on the information available to us at this time, reliance on the plain meaning of the statute appears reasonable. The statute's literal meaning is unambiguous and its application does not appear to have an absurd or unreasonable result.

Although not required to interpret Section 7-38-12.2, the legislative history of Sections 7-38-12.1 and 7-38-12.2 supports the literal meaning of the statute. The legislature added the provisions to the Property Tax Code in 2003. See 2003 N.M. Laws, ch. 118, §§ 2, 3. As originally introduced, the bill that enacted Sections 7-38-12.1 and 7-38-12.2 did not include any exceptions from the penalties for improper disclosures. See H.B. 299, 46th Leg., 1st Sess. (2003, as originally introduced). The exceptions subsequently were included in an amendment adopted by the House Taxation and Revenue Committee. According to the Fiscal Impact Report for the bill, the amendment to the penalty provision addresses the permissible revelation of otherwise "confidential information..., such as during a tax protest proceeding...." See Fiscal Impact Report for HB 299/aHTRC (Feb. 26, 2003).

In 2005, Section 7-38-12.1 was amended. Among other things, the amendment makes the requirement for filing an affidavit applicable only to transfers of residential property and requires the affidavit to include "the terms of the sale including the amount of seller incentives." Section 7-38-12.2 was not amended in 2005 and remains the same as originally enacted in 2003.

Although sparse, the legislative history of Sections 7-38-12.1 and 7-38-12.2 is consistent with the plain meaning of those provisions. The legislature evidently intended to protect information, including sale information, contained in the required affidavits, except when the Property Tax Code otherwise allows disclosure of the information or when the information is disclosed as part of a protest proceeding. Accordingly, we

conclude that Section 7-38-12.2 permits county assessors to use sale information obtained under Section 7-38-12.1 in official county protest hearings.

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