Opinion No. 02-02

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OPINION OF: PATRICIA A. MADRID, Attorney General

BY: Zachary Shandler, Assistant Attorney General

TO: The Honorable James Roger Madalena, State Representative, Box 255, Jemez Pueblo, NM 87024

QUESTION

1. Does Rio Rancho have the statutory authority to grant itself the right to enter into a contract with a private developer in order to facilitate the construction of retail business establishments?

2. Does Rio Rancho have the constitutional authority to reimburse a developer consistent with the antidonation clause of Article IX, Section 14 of the New Mexico Constitution?

3. Does Rio Rancho have the constitutional authority to reimburse a developer consistent with Article IV, Section 32 of the New Mexico Constitution?

4. Does Rio Rancho have the statutory authority to reimburse the developer in accordance with the Bateman Act?

CONCLUSION

Rio Rancho, as a home rule municipality, has authority to enter into such a contract and the authority to reimburse the developer as long as these reimbursements are derived from a special fund.

FACTS

The Rio Rancho city council adopted a Gross Receipts Investment Policy ("GRIP") on October 11, 2001. The GRIP appears to be an effort to provide an incentive to encourage commercial development of retail business establishments (i.e., malls) in Rio Rancho. According to the GRIP, Rio Rancho and a developer will enter into a contract called a development agreement. The agreement will require the developer to build the establishment and the necessary adjoining public infrastructure (i.e., improvements to roads, landscaping, connections to existing sewage lines). In exchange, Rio Rancho will reimburse the developer for his costs with "one-half of those gross receipts taxes directly attributable to retail sales within the project received by the City in each year for a specified number of years...." GRIP Resolution, City of Rio Rancho Resolution No. 59, No. 01-057, P10 (Oct. 11, 2001).[1]

ANALYSIS

Development Agreements

The term "development agreement" is a term of art. It is a "contract between a municipality and a property owner/developer, through which the municipality agrees to freeze the existing zoning regulations in exchange for public benefits." Brad Schwartz, **Development Agreements: Contracting for Vested Rights**, 28 B.C. Envtl. Aff. L. Rev. 719, 719 (2000-2001). The benefit to a municipality is that a developer agrees to build the public infrastructure necessary to connect the new development with existing public infrastructure. **See id.** at 728-729. The benefit to the developer is that the municipality agrees not to revisit zoning issues for the property. Thus, the developer gains a fixed certainty for the project.

These agreements intersect, however, with two contrary principles of law. First, the "reserved powers doctrine" dictates that a municipality cannot contract away its current, and future, police power authority. **See id.** at 734. This means a municipality cannot enter into a contract where it agrees not to enforce its zoning powers at a future date. On the other hand, the "contracts clause" of the United States Constitution forbids parties from impairing existing contracts. **See** U.S. Const. art. 1, § 10, cl. 1. This means a state and local governmental body cannot revisit a zoning issue and subsequently violate the terms of a development agreement.

Approximately twelve states, including among New Mexico's neighbors, Arizona, California and Colorado, have determined that the best way to provide clarity and limit legal challenge is to adopt a state law. These statutes authorize a municipality to enter into a development agreement, yet the statutes are specifically written to navigate between the two above-mentioned principles. They require a municipality to first pass an ordinance stating the required elements of all development agreements. These elements include: (a) who can enter into an agreement; (b) how it is entered into; (c) its duration; (d) what zoning rules will be affected; (e) the description and proposed use of the property; (f) how the agreement is consistent with current municipal planning documents; and (g) how to handle Procurement Code issues. **See Achen-Gardner v. Superior Court**, 839 P.2d 1093, 1099 (Az. 1992); David Hartman, **Risky Business: Vested Real Property Development Rights- the Texas Experience and Proposals for the Texas Legislature to Improve Certainty in the Law**, 30 Tex. Tech L. Rev. 297, 324-326 (1999).

There are two exceptions to this legislative authority model. First, a home rule municipality can use its powers to draft an ordinance to grant itself equivalent authority. "Certain Texas home-rule cities have enacted development agreement enabling ordinances under their own charter authority." **Id.** at 322. New Mexico, it should be noted, permits home rule municipalities to "exercise all legislative powers and perform all functions not expressly denied by general law or charter." N.M. Const. art. X, § 10(D). Second, a municipality can rely on its police powers to create an implied authority. **See Giger v. City of Omaha**, 442 N.W. 2d 182 (Neb. 1989) (upholding a development agreement, in absence of express statutory authority, because the municipality's police powers gave it implied authority to regulate zoning matters and the agreement was tailored to be more protective than the default zoning regulations).[2]

Your letter raises the concern that Rio Rancho may not have the statutory authority to enter into a development agreement. On first glance, it would appear that the New Mexico legislature has granted express authority to certain entities to enter into development agreements. The 2001 Legislature enacted the "Public Improvement District Act." **See** NMSA 1978, §§ 5-11-1 to -27 (2001). The Act provides for a definition of a development agreement, NMSA 1978, Section 5-11-2(D), and provides a lengthy listing of possible public infrastructure improvements, NMSA 1978, Section 5-11-2(M). The Act appears to permit, however, the creation of special taxing districts that operate as quasi-governmental development corporations. These districts do not step in the shoes of a municipality, but in the shoes of a developer, and they are actually authorized to enter into a development agreement with a municipality.

We do not read this statute to be equivalent to the authorizing statutes in Arizona, California or Colorado. This is because it does not provide the same authority to create the same type of development agreements. Rio Rancho, however, may be able to look to Texas, where home rule municipalities in absence of state authorization, have exercised their own powers to create such authority. This possibility is relevant because Rio Rancho is a home rule municipality and thus can exercise legislative functions. Second, its actions are only blocked if the Legislature has placed an express limitation, or "with words or expression which are tantamount or equivalent" to an express limitation, on its power to act. **State ex rel. Hayes v. Bonem**, 114 N.M. 627, 634, 845 P.2d 150 (1992). While there may be some overlap with the Public Improvement District Act, this Act does not provide such express limitation. In fact, it reads: "The formation of a district ... **shall not prevent**... the exercise by the municipality ... of any of its powers...." NMSA 1978, § 5-11-5 (emphasis added). It adds: "The Public Improvement District Act shall be deemed to provide an additional and alternative method ... [it] **shall not be regarded as in derogation of any powers** now existing ...." NMSA 1978, § 5-11-26 (emphasis added).

Therefore, we conclude that Rio Rancho, under its home rule authority, may enact an ordinance authorizing it to enter into a development agreement. This ordinance probably should be more specific, however, than the ordinance that created the GRIP. In order to avoid the constitutional pitfalls associated with development agreements discussed above, it would appear to be prudent to include in a newly enacted GRIP authorizing ordinance items such as: (a) who can enter into an agreement; (b) how it is entered into; (c) its duration; (d) what zoning rules[3] will be affected; (e) description and proposed use of the property; (f) how the agreement is consistent with current municipal planning documents; and (g) how to handle Procurement Code issues.

Antidonation clause

The antidonation clause is a relevant consideration whenever a public entity wants to confer a monetary benefit on a non-public entity. The clause, in its pertinent part, states: "Neither the state, nor any county, school district, or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit, or make any donation to or in aid of any person, association or **public or private corporation**...." N.M. Const. art. IX, § 14 (emphasis added). An allocation is not a donation and is permissible when the state receives adequate consideration in return. **See Village of Deming v. Hosdreg Co.**, 62 N.M. 19, 28, 303 P.2d 920, 929 (1956) (unconstitutional allocation occurs when "an allocation or appropriation of something of value, without consideration" is given to a private entity). **See, e.g.**, N.M. Att'y Gen. Op. No. 67-149 (1967) (a county's attempt to sell land to a nonprofit entity for $ 10 was not adequate consideration).

Your letter raises the concern that Rio Rancho and a developer may not be able to enter into a development agreement where the developer is reimbursed without violating this clause. However, according to the GRIP, the municipality will be paying the developer out of gross receipts tax proceeds in exchange for the developer's services in building public infrastructure. Rio Rancho is clearly receiving valuable consideration in return for its money. The GRIP states that the developer will "dedicate and convey the public infrastructure and the land associated therewith to the City upon completion of the public infrastructure improvements." GRIP Resolution, City of Rio Rancho Resolution No. 59, No. 01-057, P7 (Oct. 11, 2001). In turn, Rio Rancho is not even conferring the monetary benefit until after the developer has performed these services.[4]

Therefore, we conclude that Rio Rancho may reimburse a developer in these specified circumstances without violating the antidonation clause.

Article IV

Section 32 of Article IV of the New Mexico Constitution is a relevant consideration whenever certain public entities want to extinguish an obligation owed by a private party to that public entity. The clause, in its pertinent part, states: "No obligation or liability of any person, association or corporation ... owing to ... any municipal corporation therein, shall ever be exchanged, transferred, remitted, released, postponed ... nor shall any such obligation or liability be extinguished except by the payment thereof into the proper treasury ...." N.M. Const. art. IV, § 32. The goal of the clause is to "prevent public officials from releasing debts justly owed to the state and to discourage collusion between public officials and private citizens." N.M. Att'y Gen. Op. No. 69-69 (1969).

Your letter raises the concern that Rio Rancho and a developer may not be able to enter into a development agreement where the developer is reimbursed, or forgiven, for his impact fees without violating this clause. An impact fee is a fee imposed by a municipality on a new development project designed to generate money to pay for matters attributable to the new development. **See** NMSA 1978, § 5-8-2(1) (1993). However, according to the GRIP, these fees are going to be paid to the municipality, and then later refunded, if appropriate. This means that this obligation is extinguished when paid.[5]

Your letter also raises the concern that this reimbursement scheme is somehow limited by statute. Rio Rancho, however, is a home rule municipality. It can exercise its powers to write an ordinance that allows a developer's impact fees to be reimbursed later. It can even write an ordinance that eliminates these fees from the outset.[6]

Therefore, we conclude that Rio Rancho may reimburse the developer for these impact fees costs without violating Section 32 of Article IV.

Bateman Act

The Bateman Act, NMSA 1978, Sections 6-6-11 to -18, is a relevant consideration whenever a public entity agrees to bind itself for debts beyond one fiscal year. The law, in its pertinent part, states: "It is unlawful for any ... municipal governing body ... to become indebted or contract any debts ... during any current year, which at the end of such year, is not and cannot then be paid out of the money actually collected and belonging to that current year." NMSA 1978, § 6-6-611 (1968). There is a relevant exception. The New Mexico Supreme Court stated: "If a special fund for a special purpose is created the Bateman Act is not applicable." **City of Hobbs v. State ex rel. Reynolds**, 82 N.M. 102, 104, 476 P.2d 500 (1970). A fund consisting of gross receipts taxes is a permissible special fund. **See Bolton v. Board of County Comm'rs**, 119 N.M. 355, 365, 890 P.2d 808 (Ct. App. 1994).

Your letter raises the concern that Rio Rancho and a developer may not be able to enter into a development agreement where the developer is not reimbursed until several years later without violating this Act. However, according to the GRIP, the municipality will be paying the developer "one-half of those gross receipts taxes directly attributable to retail sales within the project received by the City in each year for a specified number of years...." GRIP Resolution, City of Rio Rancho Resolution No. 59, No. 01-057, P10 (Oct. 11, 2001). If this is intended to require that these gross receipts be set aside in a special fund dedicated for this special purpose, then we conclude that Rio Rancho may reimburse the developer over a period of years from the special fund without violating the Bateman Act. If such a special fund is not so intended and created, we believe the arrangement would likely run afoul of the Bateman Act's restriction.

GENERAL FOOTNOTES

n1 Your letter does not ask us to examine nor do we address whether this is a proper use of gross receipt taxes as authorized in Rio Rancho's existing gross receipts tax ordinance.

n2 New Mexico courts have narrowly construed a public body's use of implied powers and would not likely interpret a non-home rule municipality's police powers so broadly. **See Kennecott Copper Corp. v. Environmental Improvement Bd.**, 84 N.M. 193, 195, 500 P.2d 1316 (Ct. App. 1972) (implied powers are limited to the powers necessary to effectuate express powers). In fact, the implied authority argument is the minority viewpoint. "Express authority is preferred because it resolves the contract zoning issue and is better able to withstand reserved powers doctrine and ultra vires challenge." Schwartz, at 733, n. 116. In addition, given "the often staggering costs involved [for the private developer] ... there [is] an obvious mutual interest in avoiding reliance upon implied authority where possible." John Delaney, **Development Agreements: The Road from Prohibition to 'Let's Make a Deal!'**, 25 Urb. Law. 49, 55 (1993).

n3 The GRIP does not include language about zoning matters. However, if a future version of the ordinance does cover this area, its drafters should be aware of **Dacy v. Village of Ruidoso**, 114 N.M. 699, 845 P.2d 793 (1992), where the New Mexico Supreme Court ruled that agreements between a municipality and a developer regarding particular zoning matters may be illegal under certain circumstances.

n4 Since this exchange appears to be permissible under classical antidonation clause analysis, we do not need to review the economic development exception to the clause in Article IX, Section 14(D).

n5 The issue then becomes whether this refund violates the antidonation clause. In order to avoid this concern, the parties may want to reference the refund of the impact fees in the development agreement so it is understood that the refund is part of the overall exchange.

n6 This scheme would be consistent with the Development Fees Act, NMSA 1978, 5-8-1 to--42. The Act reads: "A developer and a municipality ... may agree to offset or reduce part or **all of the impact fees**...." NMSA 1978, § 5-8-13 (1993) (emphasis added). It would also avoid any suggestion that might be raised in connection with the GRIP that Rio Rancho's refund process was an attempt to circumvent Section 32 of Article IV.