



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2022-04

April 1, 2022¹

QUESTION PRESENTED²

The Taos County Cooperative Weed Management Area (“Taos CWMA”) has applied for a \$19,949 grant from the Forestry Division of the New Mexico Energy, Minerals and Natural Resources Department to address noxious weeds on forest-adjacent land located in Taos County and owned by Southern Methodist University. The Taos Chapter of the Native Plant Society of New Mexico (“Taos NPSNM”), a 501(c)(3) organization, is one of the members of the Taos CWMA and has agreed to be the fiscal sponsor for the project. If the Forestry Division grants the funds, the Taos CWMA members (which include several governmental entities) and the Southern Methodist University will provide matching in-kind contributions valued at \$19,949. Under the match, the Southern Methodist

¹This is an official advisory opinion of the State Ethics Commission. Unless amended or revoked, this opinion is binding on the Commission and its hearing officers in any subsequent Commission proceeding concerning a person who acted in good faith and in reasonable reliance on the opinion. NMSA 1978, § 10-16G-8(C).

²The State Ethics Commission Act requires a request for an advisory opinion to set forth a “specific set of circumstances involving an ethics issue.” *See* NMSA 1978, § 10-16G-8(A)(2) (2019). “When the Commission issues an advisory opinion, the opinion is tailored to the ‘specific set’ of factual circumstances that the request identifies.” State Ethics Comm’n, Advisory Op. No. 2020-01, at 1-2 (Feb. 7, 2020) (quoting § 10-16G-8(A)(2)). For the purposes of issuing an advisory opinion, the Commission assumes the facts as articulated in a request for an advisory opinion as true and does not investigate their veracity. On January 26, 2022, the Commission received a request for an advisory letter that detailed the issues as presented herein. *See* 1.8.1.9(B) NMAC. The request was submitted by a public official who has the authority to submit a request. *See generally* NMSA 1978, § 10-16G-8(A)(1); 1.8.1.9(B)(1) NMAC. The executive director provided an advisory letter in response to the request on January 28, 2022. Commissioner Bluestone subsequently requested that the advisory letter be converted into an advisory opinion. *See* 1.8.1.9(B)(3) NMAC. The Commission now issues the guidance as an advisory opinion. *See id.*

University will provide all of the labor to complete the project. The Forestry Division “has indicated that the proposal has been approved, but they are concerned that this project might in some way violate NM’s anti-donation law.” The request asks the Commission’s attorney staff to provide an opinion.

ANSWERS AND ANALYSIS

The Anti-Donation Clause provides, “Neither the State nor any county, school district or municipality . . . 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,” except as permitted by the Constitution. N.M. Const. Art. IX, § 14. “The Anti-Donation Clause . . . prohibits the use of state or local governmental funds to benefit private organizations.” *City of Raton v. Ark. River Power Auth.*, 600 F. Supp. 2d 1130, 1147 (D.N.M. 2008) (quoting H. Stratton & P. Farley, *Office of the Attorney General, State of New Mexico, History, Powers & Responsibilities, 1846–1990* at 125 (Univ. of N.M. Printing Servs. 1990)).

More specifically, the Anti-Donation Clause prohibits two kinds of transactions, and anti-donation claims correspondingly fall into one of two types. *See City of Raton*, 600 F. Supp. 2d at 1160 (citing N.M. Attorney General Op. No. 85-27, at 3, 1985 WL 204889 (October 22, 1985)). The first type involves government-funded “donations”—*i.e.*, transfers of property or money by a government entity to a private person for which the government entity receives nothing of value in return. *See, e.g., State ex rel. Mechem v. Hannah*, 1957-NMSC-065, 63 N.M. 110 (invalidating state-backed certificates issued to cattle ranchers to defray cost of hay during drought). The second type involves transactions in which a governmental entity has pledged its credit for the benefit of private enterprise. *See, e.g., Hutcheson v. Atherton*, 1940-NMSC-001, 44 N.M. 144 (invalidating a statute purporting to authorize counties to issue bonds for construction of auditoriums to be used by the New Mexico Centennial Coronado Corporation). The question presented is a type-one question: May the Forestry Division transfer \$19,949 to a 501(c)(3) organization for a project to address noxious weeds on forest-adjacent land owned by Southern Methodist University, a private corporation?

The answer depends on whether the Forestry Division enters a contract with Taos NPSNM (or another contracting party), such that, in exchange for the \$19,949 transfer, Taos NPSNM (or another contracting party) agrees to provide the Forestry Division with valuable consideration in return. The Anti-Donation Clause prohibits outright gifts of money or property to a private entity “with no exchange

of adequate consideration.” *City of Raton*, 600 F. Supp. 2d at 1147 (citations omitted). But where a governmental entity contracts to receive something of value in exchange for the transfer of money or property, there is no constitutional violation. *See City of Raton*, 600 F. Supp. 2d at 1161 (“The Court does not believe that the Anti-Donation Clause is implicated when there is true consideration—money exchanged for a real product.”); *State ex rel. Office of State Engineer v. Lewis*, 2007-NMCA-008, ¶ 51, 141 N.M. 1 (appropriation to purchase and retire water rights no violation of the Anti-Donation Clause, because state received water rights in return for payment).³

The request for guidance did not include a copy of a draft agreement, either between the Forestry Division and NPSNM or between the Forestry Division and Taos CCWA. As a result, there is no language for the Commission to scrutinize as to whether the State is receiving something valuable in exchange for the \$19,949 transfer.⁴ However, we can imagine a circumstance in which the State would receive consideration: suppose, for example, that the State has an interest in the forest land adjacent to the Southern Methodist University property on which there is a noxious weed infestation. A promise by NPSNM to remediate noxious weeds on the university’s property could be of value to the State’s interest in the adjacent forest land. In that circumstance, the \$19,949 transfer to NPSNM would not be a donation; it would be a payment under contract for consideration.

We can also imagine a circumstance where the State would not receive consideration: for example, Southern Methodist University may be required to remove noxious weeds by law. *See, e.g.*, Taos County, N.M., Ordinance 2018-2 App’x 3 § 5(A) (Sept. 4, 2018) (prohibiting “use of any species [of plant] considered noxious, or a weed species that could enhance the distribution of undesirable species” in areas subject to a special use zoning permit or major

³ The focus is on whether the government receives consideration in exchange for its transfer; donations (i.e., transfers without consideration) do not escape constitutional prohibition simply because the donation furthers a public purpose. *See State ex rel. Sena v. Trujillo*, 1942-NMSC-044, ¶ 30, 46 N.M. 361 (“The constitution makes no distinction as between ‘donations’, whether they be for a good cause or a questionable one. It prohibits them all.”).

⁴ In *City of Raton*, the Court observed that a review of contracts for consideration is often part of an analysis for conformity with the Anti-Donation Clauses:

New Mexico courts, and the New Mexico Attorney General’s Office, have generally, in analyzing the state’s Anti-Donation Clause, scrutinized contracts for consideration. If the courts or the Attorney General’s office finds consideration, the courts and the Attorney General’s office generally end their review. Courts and third-party lawyers are reluctant to wade into the thicket of determining whether the consideration is adequate or fair.

City of Raton, 600 F. Supp. 2d at 1160.

development zoning permit requirement); *see also* Restatement (Second) of Contracts § 73 (1981) (“Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration”). If the State is paying Southern Methodist University to do something Southern Methodist University is already required to do by law, then the State is not receiving anything of value in exchange. Where the State is *not* receiving anything of value in exchange for the \$19,949, the transfer is more in the nature of a gift to NPSNM and Southern Methodist University. In that event, the Constitution prohibits the transfer. *See Village of Deming v. Hosderg Co.*, 1956-NMSC-111, ¶ 36, 62 N.M. 18 (concluding that the term “donation” in Article IX, Section 14 “has been applied, in its ordinary sense and meaning, as a ‘gift,’ an allocation or appropriation of something of value, without consideration”).

We observe that if the purported grantee were not a 501(c)(3) organization but rather a governmental-entity member of the Taos CWMA—such as the Taos Soil and Water Conservation District, the Town of Taos, Taos County, or NMSU Cooperative Extension Service—then there would be no immediate issue under the Anti-Donation Clause. The Anti-Donation Clause is not implicated when the parties involved in a donative transfer are a state agency and another governmental entity. *See City of Gallup v. N.M. State Park & Recreation Comm’n*, 1974-NMSC-084, ¶ 11, 86 N.M. 745 (holding that the anti-donation prohibition “is inapplicable . . . when the parties involved are the State and its subordinate governmental agencies”); *Wiggs v. City of Albuquerque*, 1952-NMSC-013, ¶ 20, 56 N.M. 214 (“[W]e have held this provision has no application where the lending of credit is under legislative sanction by one subordinate governmental agency to another. Accordingly, if this be a lending of credit by the City of Albuquerque to the University as claimed, it constitutes no violation of this constitutional provision.”) (citing *Harrington v. Atteberry*, 21 N.M. 50 (N.M. 1915); *White v. Bd. of Educ. of Silver City*, 42 N.M. 94 (N.M. 1938); and *Hutcheson v. Atherton*, 44 N.M. 144 (N.M. 1940))). The Forestry Division can transfer funds to another governmental entity without implicating the Anti-Donation Clause.

We further observe, however, that the Anti-Donation Clause issue might reappear, even where the Forestry Division grants the projects funds to a governmental entity. Suppose, for example, that (i) the Forestry Division granted \$19,949 to Taos County to address noxious weed infestations on land within the county; and (ii) Taos County wanted to grant the same funds to Taos NPSNM (or another 501(c)(3) organization) to remediate noxious weeds on private land. In that circumstance, the relevant anti-donation analysis would look to the agreement between Taos County and Taos NPSNM to confirm that Taos County is receiving

valuable consideration in exchange for the \$19,949 payment to the 501(c)(3) organization. (Perhaps it is Taos County who has the interest in the adjacent forest land.) In any event, where a private party (such as, in this matter, Taos NPSNM) receives public funds from a state agency, a county or a municipality, the Anti-Donation Clause generally requires scrutiny into whether the funds are transferred as part of a contract in which a New Mexico governmental entity receives consideration.

Last, the request indicates that CWMA members would provide in-kind contributions valued at \$19,949, at least part of which is labor provided by Southern Methodist University. Because the request does not detail (i) what in-kind contributions might be provided by governmental entity members of the CWMA, such as the Town of Taos and Taos County; (ii) to whom the in-kind contributions are directed; and (iii) the terms of any agreement governing the provision of the CWMA-member contributions, we not provide additional guidance as to the application of the Anti-Donation Clause beyond what we have provided above.

CONCLUSION

Under the Anti-Donation Clause, whether the Forestry Division may grant \$19,949 to the Taos NPSNM, a 501(c)(3) organization, depends on whether the State receives valuable consideration in exchange for the granted funds.

SO ISSUED.

HON. WILLIAM F. LANG, Chair
JEFFREY L. BAKER, Commissioner
STUART M. BLUESTONE, Commissioner
HON. GARREY CARRUTHERS, Commissioner
HON. CELIA FOY CASTILLO, Commissioner
JUDY VILLANUEVA, Commissioner