



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2022-07

August 5, 2022¹

QUESTION PRESENTED²

At the May 16, 2022, Albuquerque City Council meeting, the Council passed Floor Amendment No. 13 to the City's operating budget bill. According to an "explanation" contained in the amendment and to an official press release, the amendment added "\$250,000 for a Council directed sponsorship to Planned Parenthood of New Mexico." The operating budget bill was passed and then signed by Mayor Tim Keller.

The questions presented to the State Ethics Commission are:

1. Does the 'Council-directed sponsorship to Planned Parenthood of New Mexico,' a private corporation, violate Article IX, Section 14 of the Constitution?

¹ This 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).

² The 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). On June 3, 2022, the Commission received a request for an advisory opinion that detailed the issues as presented herein. *See* 1.8.1.9(A) NMAC. The request was submitted by a public official with authority to request an opinion. *See generally* NMSA 1978, § 10-16G-8(A)(1); 1.8.1.9(A)(1) NMAC.

2. Does the ‘Council-directed sponsorship to Planned Parenthood of New Mexico’ violate the Procurement Code?

ANSWER

No, to each question.

ANALYSIS

I.

A.

The Anti-Donation Clause provides “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. Except where an exception applies, the Anti-Donation Clause prohibits two types of transactions. *See City of Raton v. Ark. River Power Auth.*, 600 F. Supp. 2d 1130, 1147 (D.N.M. 2008) (Browning, J.) (citing N.M. Att’y Gen. Op. 85-27, at 3 (Oct. 22, 1985)). First, the Anti-Donation Clause prohibits a governmental entity from pledging its credit to benefit a 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 Fourth Centennial Coronado Corporation, a private entity). Second, and more relevant to the question presented, the Anti-Donation Clause prohibits “donations” 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). If the governmental entity receives something of value in exchange for its provision of public funds—which, in the language of contract law, is called “consideration”—then there is no donation and, thus, no application of Article IX, Section 14. *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, ¶¶ 50-52, 141 N.M. 1 (appropriation to

purchase and retire water rights not a violation of the Anti-Donation Clause because the state received water rights in return for payment).³

The Anti-Donation Clause, however, does not prohibit all donations of public funds from a governmental entity to a private person. Article IX, Section 14 enumerates six categories of transfers of public funds that Anti-Donation Clause does not prohibit. For example, Article IX, Subsection 14(A) provides “Nothing in this section prohibits the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons.” N.M. Const., art. IX, § 14(A). We observe two, well-established points regarding the application of this exception.

First, for a governmental entity to direct aid to a private person, the Constitution does not require the targeted recipient to be both sick *and* indigent; the targeted recipient need only be “sick” *or* “indigent.” *See* N.M. Att’y Gen. Op. 83-04 (July 29, 1983) (“A donation for the care and maintenance of either the sick or the indigent is not prohibited.”); N.M. Att’y Gen. Op. 58-135 (June 23, 1958) (quoting N.M. Att’y Gen. Op. 57-26 (Feb. 14, 1957) (“It is our view that such care and maintenance be extended to those who are either sick *or* indigent. It would not seem necessary that a person, in order to secure such assistance, be both sick *and* indigent.” (emphasis original))).

Second, whether a person is “indigent” within a meaning of Article IX, Subsection 14(A) depends on a current understanding of indigence and not the standard of indigence extant in 1912, when the exception came into effect. In *Humana of New Mexico v. Board of County Commissioners*, the New Mexico Supreme Court reviewed the constitutionality of the Indigent Hospital Claims Act, NMSA 1953, §§13-2-12, *et seq.* (Repl. 1976), and concluded that the statute’s definition of “indigent patient” was consistent with the meaning of “indigent persons” in Article IX, Subsection 14(A). *See* 1978-NMSC-036, ¶ 15, 92 N.M. 34. In reaching its holding, the Supreme Court rejected an interpretation of “indigent” that anchored its application to the standard of indigence prevalent in 1912. *See* 1978-NMSC-036, ¶¶ 12–14. Rather, the Court made clear that the meaning of “indigent” floats with the “passage of time.” *Id.* ¶ 14.

³ The focus is whether the government receives consideration in exchange for its transfer. Donations—again, 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.”).

B.

In view of the foregoing, well-established interpretations of Article IX, Section 14, we conclude that the facts presented by the request do not constitute a violation of the Anti-Donation Clause.

At the outset, we are unsure whether an explanation to a floor amendment to a municipal budget in and of itself constitutes an act by which a municipality “make[s] any donation to or in aid of any person, association or public or private corporation[.]” N.M. Const., art. IX, § 14. The request for the advisory opinion attaches the May 16, 2022 City Council Floor Amendment No. 13 to C/S R-22-24.⁴ The amendment increases the appropriation for “Health and Human Services” by \$250,000 and includes an “explanation” that the amendment adds \$250,000 “for a Council directed sponsorship to Planned Parenthood of New Mexico.” *See* City Council of the City of Albuquerque, Floor Amendment No. 13 to C/S R-22-24 (May 16, 2022). The explanation to the floor amendment appears separately and below the amendment itself; as such, it is not clear that the explanation in the floor amendment binds the Mayor’s discretion in the expenditure of the appropriated funds. Furthermore, the explanation accompanying the floor amendment is not replicated in the resolution that comprises the City of Albuquerque’s budget. *Compare* City Council of the City of Albuquerque, Floor Amendment No. 13 to C/S R-22-24 (May 16, 2022), *with* City of Albuquerque, C/S R-22-24, Enactment No. 2022-036 (June 1, 2022), *available at* <https://tinyurl.com/4ecy5xde>. And it is “[t]he annual operating budget appropriation resolution . . . [that] constitute[s] the city’s operating budget for the ensuing fiscal year.” Albuquerque, N.M., Rev. Ordinances of Albuquerque § 2-11-12(A) (1974, amended 1995). It is not certain, therefore, that the explanation accompanying the May 16, 2022 Floor Amendment No. 13 to C/S R-22-24 constitutes an act by which a municipality “make[s] any donation” to a private person or corporation. N.M. Const., art. IX, § 14.

Prescinding from the question whether the explanation in the floor amendment binds the expenditure of City funds, and assuming *arguendo* that the City expends the \$250,000 consistent with the floor amendment’s explanation for a sponsorship of Planned Parenthood of New Mexico, the request presents no additional facts that suggest that such an expenditure necessarily violates the Anti-Donation Clause. The constitutional question depends on the details of the

⁴ Without disclosing the request or the identity of the requester, we attach the May 16, 2022 City Council Floor Amendment No. 13 to C/S R-22-24. *See* Attachment 1 hereto.

sponsorship. If, through grant conditions effectuating the sponsorship, the City of Albuquerque provided city funds to Planned Parenthood of New Mexico “for the care and maintenance” of sick persons or indigent persons, then the sponsorship would not violate the constitutional prohibition. *See* Article IX, §14(A). Or, if under a grant agreement, the City of Albuquerque received a commitment or some other thing of value in exchange for the provision of city funds which constitutes “true consideration” under the law of contracts, then, again, the sponsorship would not violate the constitution. *City of Raton*, 600 F. Supp. 2d at 1161. The request for an advisory opinion does not provide or posit any details regarding the City of Albuquerque’s potential expenditure of funds for a sponsorship of Planned Parenthood of New Mexico. Accordingly, under the facts presented, we do not conclude that the sponsorship to Planned Parenthood of New Mexico violates Article IX, Section 14 of the New Mexico Constitution.

II.

The request for an advisory opinion also asks the Commission to opine on whether the Council-directed sponsorship to Planned Parenthood of New Mexico violates the Procurement Code. It does not. The Procurement Code “shall not apply to . . . municipalities having adopted home rule charters and having enacted their own purchasing ordinances[.]” NMSA 1978, § 13-1-98(K) (2019); *see also* N.M. Const. art X, § 6(D) (stating that a municipality “which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter”). The City of Albuquerque has adopted a home rule charter. *See* City of Albuquerque Charter Art. I (Adopted at Special Election, June 29, 1971). The City’s own procurement ordinance therefore “govern[s] all purchasing transactions of the city and shall serve to exempt the city from all provisions of the New Mexico Procurement Code” Albuquerque, N.M., Rev. Ordinances of Albuquerque § 5-5-1 (1974, amended 1998). Accordingly, the Procurement Code does not apply to any purchase of goods or services by the City of Albuquerque and, hence, is not implicated by a transaction between the City of Albuquerque and Planned Parenthood of New Mexico.

CONCLUSION

For the foregoing reasons and under the facts presented, the sponsorship of Planned Parenthood of New Mexico noted in in the explanation section of City Council Floor Amendment No. 13 to C/S R-22-24 (May 16, 2022) violates neither the Anti-Donation Clause nor the Procurement Code.

SO ISSUED.

HON. WILLIAM F. LANG, Chair

JEFFREY L. BAKER, Commissioner

STUART M. BLUESTONE, Commissioner

HON. GARREY CARRUTHERS, Commissioner

HON. CELIA FOY CASTILLO, Commissioner

RON SOLIMON, Commissioner

JUDY VILLANUEVA, Commissioner

THIS AMENDMENT PASSED 6-3.
For: Benton, Peña, Bassan, Davis, Fiebelkorn, Jones
Against: Lewis, Sanchez, Grout

**CITY COUNCIL
of the
CITY OF ALBUQUERQUE**

May 16, 2022

FLOOR AMENDMENT NO. 13 TO C/S R-22-24

AMENDMENT SPONSORED BY COUNCILOR Fiebelkorn

1. On page 3, line 27 entitled "Affordable Housing" reduce the amount by \$500,000.
2. On page 3, line 33 entitled "Health and Human Services" increase the amount by \$250,000.

Explanation: This amendment removes the amount in Family and Community Services designated for the Family Promise project. It is the Council's intent to appropriate \$500,000 from the second tranche of American Rescue Plan Act (ARPA) for this project. The amendment also adds \$250,000 for a Council directed sponsorship to Planned Parenthood of New Mexico.