



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2023-05

August 4, 2023¹

QUESTION PRESENTED²

A Village has a recreational vehicle (“RV”) park located within it. Adjacent to the RV park is a small triangular piece of property which is owned by the Village. For many years, the RV park used that parcel of Village property as an extension of the RV park, accommodating three to four recreational vehicles. Consequently, at some point, the Village lost institutional memory of its ownership of the parcel.

In 2019, an individual acquired the RV park, but did not purchase the small triangular piece of Village property. In 2020, that same individual was elected as a Village

¹ This is an official advisory opinion of the New Mexico State Ethics Commission. Unless amended or revoked, this opinion is binding on the Commission and its hearing officers in any subsequent Commission proceedings concerning a person who acted in good faith and in reasonable reliance on the advisory opinion. NMSA 1978, § 10-16G-8(C) (2019).

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[.]” 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, 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 June 6, 2023, the Commission received a request for an advisory letter that detailed the issues as presented herein. *See* 1.8.1.9(B) NMAC. Commissioner Baker requested that the advisory letter be converted into a formal advisory opinion. *See* 1.8.19(B)(3) NMAC. *See generally* NMSA 1978, § 10-16G-8(A)(1); 1.8.1.9(A)(1) NMAC.

Trustee. In 2022, the Village discovered that the RV park was using the Village's property. The Trustee has conceded the Village's ownership of the parcel, requested that the Village vacate the parcel, and has expressed interest in purchasing the parcel, which has been appraised at \$5,250.00.

Based on these facts: (1) What obligations does the Village have in any transaction between the Village and the Trustee regarding the parcel, including whether the Village has an obligation to recoup funds from the Trustee for her use of the parcel since 2019, such that the Village should seek compensation beyond the appraised value? (2) Does the use of the RV park violate the Anti-Donation Clause, and if so, how should the Village address it?

ANSWERS AND ANALYSIS

The posited facts implicate two laws within the Commission's purview: the Governmental Conduct Act, NMSA 1978, §§ 10-16-1 to -18 (1967, as amended through 2023), and Article IX, Section 14 of the New Mexico Constitution, known as the Anti-Donation Clause. Under the Governmental Conduct Act, the Village must post notice of any lease or sale of the subject property to the Village Trustee and any such lease or sale may only be entered into following a competitive process. The RV park's use of the Village's property without compensation likely violates the Anti-Donation Clause. The Village should remedy that constitutional violation and has several means to do so.

1. The Governmental Conduct Act

Subsection 10-16-7(B) of the Governmental Conduct Act provides:

Unless a public officer or employee has disclosed the public officer's or employee's substantial interest *through public notice* and *unless a contract is awarded pursuant to a competitive process*, a local government agency shall not enter into a contract with a public officer or employee of that local government agency, with the family of the public officer or employee or with a business in which the

public officer or employee or the family of the public officer or employee has a substantial interest.

NMSA 1978, § 10-16-7(B) (2011) (emphasis added).

Given the facts above, the Trustee is a public officer for the Village, and the proposed sale or lease would either be with the Trustee herself or with a business in which she has a substantial interest. *See* § 10-16-2(I), (L). In accordance with Subsection 10-16-7(B), the public must therefore have notice of the Trustee's interest in a transaction between the Village and the RV park (or between the Village and the Trustee directly). Next, the Village may enter into a transaction with the RV park (or the Trustee) for the sale or lease of the Village property only after following a competitive process. The requirement that this contract follow a competitive process applies even though the Procurement Code itself does not apply to contracts by which local public bodies sell real property. *See* NMSA 1978, § 13-1-30(A) (2005) (providing for the application of the Procurement Code); *cf. generally* NMSA 1978, §§ 13-6-2 (2007) to 13-6-2.1 (2011) (providing for the sale of real property by a local public body). Accordingly, before entering into a transaction with the RV park, the Village must publicly advertise the property for sale (or lease) and provide persons other than the RV park (or the Trustee) with an equal opportunity to contract with the Village. *See, e.g.*, N.M. Att'y Gen. Op., No. 88-42 (Jun. 28, 1988) (interpreting a previous version of Subsection 10-16-7(B) and citing *Wilmington Parking Auth. v. Ranken*, 34 Del. Ch. 439, 105 A.2d 614, (1954) and *Sterrett v. Bell*, 240 S.W.2d 516, (Tex. Civ. App. 1951)). As to the Village's potential sale (or lease) of real property to a business in which a Trustee is substantially interested, this statutory requirement is likely satisfied by the Village advertising that the property is for sale (or lease) by whatever means commercial property in the county is ordinarily advertised.

Other provisions of the Governmental Conduct Act are also relevant to any transaction between the Village and the RV park (or the Trustee). The Trustee likely is required to recuse from all aspects of the land sale or lease transaction: she cannot participate in Board discussions about how to advertise the Village's property, *see* NMSA 1978, § 10-16-13 (2011), and she cannot participate in any vote to direct or to approve a land sale or lease transaction between the Village and the RV park (or herself), *see* NMSA 1978, § 10-16-4(B) (2011). The Governmental Conduct Act's conflict-of-interest provisions ensure that the Village Trustee act only in the public's interest and not to obtain a personal benefit or advance a private interest. *See generally* NMSA 1978, § 10-16-3(A) (2011).

2. The Anti-Donation Clause

The Governmental Conduct Act addresses only the process that the Village must follow in order to enter into a contract with the RV park (or the Trustee) that is safeguarded from conflicts of interest. The Governmental Conduct Act does not address what compensation the Village must receive through such a contract. To analyze that issue, we must look to the Anti-Donation Clause and the case law interpreting it.

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 or in aid of any private enterprise for the construction of any railroad except as provided in Subsections A through H of this section.

N.M. Const. art. IX, § 14.

Under the Anti-Donation Clause, the Village may not donate the triangular parcel (or the use thereof) to the RV park (or the Trustee). However, if the Village receives something in exchange for the parcel (or for the use of the parcel), then there is no “donation” and, thus, no application of Article IX, Section 14. *See City of Raton v. Ark. River Power Auth.*, 600 F. Supp. 2d 1130, 1161 (D.N.M. 2008) (“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 (holding that a disbursement to purchase and retire water rights not a violation of the Anti-Donation Clause because the state received water rights in return for payment).

This common law exception to the Anti-Donation Clause’s application sounds in the concept of consideration in contract law. *See, e.g., Romero v. Earl*, 1991-NMSC-042, ¶ 6, 111 N.M. 789 (quoting Restatement (Second) of Contracts § 71 (1979)). In the private law context, the inquiry is generally limited to determining the existence of consideration; courts do not inquire into whether a party receives a “fair” bargain. *See Restatement (Second) of Contracts § 79* (1981)

“If the requirement of consideration is met, there is no additional requirement of a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promise[.]”). This is known as “the first lesson in contracts, the peppercorn theory—that courts will not inquire into the adequacy of consideration so long as it was true and valuable.” *Pope v. Savings Bank of Puget Sound*, 850 F.2d 1345, 1356 (9th Cir. 1988). In contrast to the private law of contracts, the inquiry under the Anti-Donation Clause likely is not so liberal; otherwise, the government could end-run the Anti-Donation Clause by stipulating that the recipient of some donation provide some trivial sum in exchange. Even so, courts do not second-guess policymakers in weighing whether the government realizes the maximum possible value (or even fair market value) from a given transaction. *See City of Raton*, 600 F. Supp. 2d at 1161. Rather, the courts “merely check for *adequate* consideration.” *Id.* (emphasis added); *see also, e.g., City of Gallup v. New Mexico State Park & Recreation Comm’n*, 1974-NMSC-084, ¶ 9, 86 N.M. 745 (rejecting an Anti-Donation challenge because the State would “get value received” for its provision of \$1.5 million for the Red Rock State Park); *White v. Bd. of Educ. of Silver City*, 1938-NMSC-009, ¶ 31, 42 N.M. 94 (rejecting an Anti-Donation challenge to a school board’s bond issuance because the school board “was actuated by a spirit of self-interest in the matter, and that under the plan outlined in the statute it will get value received for every dollar put into the enterprise”);

This law frames part of the Request’s first question. The Request asks whether, in any sale transaction between the Village and the Trustee, the Village has an obligation to recoup funds in excess of the parcel’s appraised value as compensation for the RV park’s use of the Village’s parcel over the last several years. It is likely that the RV park’s uncompensated use of the Village’s parcel—occurring both before and during the Trustee’s ownership of the RV park—violates the Anti-Donation Clause. The Village seemingly has given the RV park a free leasehold for a small parcel for several years, a gift which continues currently.

Even so, the Village can act to remedy the constitutional violation without having to bargain for a purchase price in excess of the parcel’s appraised value; indeed, it seems as though there are other ways for the Village to remedy the unconstitutional donation. For example, the Village could enter into a sale or lease agreement with the RV park (or the Trustee) under which the Village receives from the RV park (or the Trustee) *not only* the purchase price based on the appraised value or a right to lease payments, *but also* a release and indemnification for any premises (or other) liability that the Village might incur as the owner of a parcel occupied by both the RV park and third parties. Both a purchase or lease payment, plus a release and indemnification, would likely constitute adequate consideration

that the Village receives in exchange for the RV park's past, current, and future use of Village property. Such consideration likely would avoid any Anti-Donation issue. *See, e.g., City of Raton*, 600 F. Supp. 2d at 1161 (rejecting Anti-Donation Clause challenge where municipality receives true consideration); *City of Gallup*, 1974-NMSC-084, ¶ 9 (rejecting an Anti-Donation challenge where State would “get value received” for disbursement of state funds). By entering into such a contract, the Village would be “actuated by a spirit of self-interest in the matter[.]” *White v. Bd. of Educ. of Silver City*, 1938-NMSC-009, ¶ 31, 42 N.M. 94. As such, it is unlikely that a court would conclude that the sale or lease contract is an unconstitutional donation.

The Request next inquires how the Village should address the Trustee's previous and continued use of the property if the Village and the Trustee do not reach a sale or lease agreement. In that event, by allowing the RV park (and the Trustee) to have a free leasehold on Village property, the Village would remain in violation of the Anti-Donation Clause. Violations of the Anti-Donation Clause are ordinarily remedied by court actions seeking injunctive relief (to stop the government from making an unconstitutional donation) and restitution (to recoup the unconstitutional transfer of the public's property). *See State ex rel. Callaway v. Axtell*, 1964-NMSC-046, ¶¶ 26-29, 74 N.M. 339 (holding that the State could seek restitution of public monies disbursed to private individuals in violation of the Anti-Donation Clause). If a sale or lease transaction is unsuccessful and an Anti-Donation Clause issue persists, the Village should consider action to come into compliance with the Constitution, including an action for ejectment or other appropriate court action to reclaim access and control of the Village's property. *See, e.g., NMSA 1978, §§ 42-4-1 to -30 (1907)*.

Furthermore, the Village might also have an action for restitution to recoup a benefit given to the Trustee after she acquired the RV park in 2019. *See, e.g., Axtell*, 1964-NMSC-046, ¶¶ 26-29. Notably, while the *Axtell* Court held that public monies could be recovered by the State, the *Axtell* Court did *not* hold that the Anti-Donation Clause *required* the Attorney General to bring a restitution claim for the unconstitutionally disbursed public funds. Rather, the *Axtell* Court held that public monies paid under mistake of law *may* be recovered and, therefore, reversed the trial court's dismissal of the State's restitution claim. *Id.* ¶¶ 15, 29. Accordingly, as consistent with the above analysis, the law does not necessarily compel the Village specifically to recoup the value given to the RV park from 2019 to the present; nevertheless, the Village might decide to pursue a restitution claim in the event it is unable to arrange a satisfactory disposition of the property.

CONCLUSION

In any sale or lease of the Village property to the RV park (or the Trustee), the Village must provide notice of the Trustee's interest and must follow a competitive process before entering into such a transaction. The RV park's use of the Village's property without compensation likely violates the Anti-Donation Clause; the Village should remedy that constitutional violation and has several means to do so.

SO ISSUED.

HON. WILLIAM F. LANG, Chair

JEFF BAKER, Commissioner

STUART M. BLUESTONE, Commissioner

HON. CELIA FOY CASTILLO, Commissioner

RONALD SOLIMON, Commissioner

DR. JUDY VILLANUEVA, Commissioner