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April 1, 2014

The Honorable Ron Griggs
New Mexico State Senator
2704 Birdie Loop
Alamogordo, N.M. 88310

The Honorable Yvette Herrell
New Mexico State Representative
P.O. Box 4338
Alamogordo, N.M. 88311

Re: Opinion Request-Voter Approval of Hold Harmless Gross Receipts Tax

Dear Senator Griggs and Representative Herrell:

You have asked for this Office's position on (1) Attorney General Op. No. 90-20 (1990) and (2) whether the City of Alamogordo may submit the question of whether to enact the hold harmless gross receipts tax as provided in HB 641 to the qualified electors of Alamogordo, and if so, whether the result of that vote would be binding. As discussed in more detail below, we conclude first, Attorney General Op. No. 90-20 is still applicable because there have been no changes in the law that affect its validity; and second, the City of Alamogordo may not legally submit the question of whether to enact the hold harmless gross receipts tax provided in HB 641 to its qualified electors.

Attorney General Opinion No. 90-20 addressed whether Alamogordo and other home rule municipalities could enact an ordinance that would prohibit the local governing body from imposing any tax increase without first putting the question of the tax increase to a vote. After reviewing the applicable New Mexico case law, the Municipal Gross Receipts Tax Act, NMSA 1978, Sections 7-19-1 through -9, and our state's constitution, the Opinion concluded that home rule municipalities do not have the power through initiative petition to alter a tax mandated by state law.

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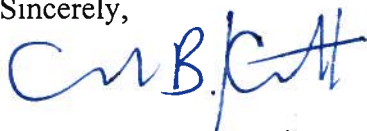
As discussed in Attorney General Opinion No. 90-20, "Alamogordo has been a home rule municipality since 1983, when its voters adopted a city charter that provides for municipal home rule pursuant to Article X, Section 6 of the New Mexico Constitution." Article X, Section 6(D) provides that "[n]o tax imposed by the governing body of a charter municipality, except a tax authorized by general law, shall become effective until approved by a majority vote in the charter municipality" (emphasis added). A "general law" is a law that applies generally throughout the state or is "of general concern to the people of the state." See Apodaca v. Wilson, 1974-NMSC-071, ¶ 16.

HB 641, codified as NMSA 1978, Section 7-19D-18 (2013)¹ and effective as of July 1, 2013, is a general law that applies throughout the state and is of general concern to New Mexicans. The law authorizes municipalities to impose, by ordinance, an excise tax on the gross receipts of individuals engaging in business in the municipality. The tax is referred to as the "municipal hold harmless gross receipts tax." See Section 7-19D-18(B). The law states that "[t]he imposition of a municipal hold harmless gross receipts tax is not subject to referendum." Id.

The municipal hold harmless gross receipts tax is a tax authorized by general law and, by its terms, becomes effective when a municipality's governing body passes an ordinance imposing it. As stated in Section 7-19D-18, the municipality cannot submit the imposition of the tax to its qualified electors, and that action is excepted from the requirement for voter approval under Article X, Section 6(D) of our state's constitution. Accordingly, submitting the imposition of the tax to a vote would be contrary to Section 7-19D-18(B) and Article X, Section 6(D). Should the City of Alamogordo decide to submit this question to its qualified electors, the result of that vote will have no legal effect.

Your request to us was for an Attorney General 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,



CHARLES B. KRAFT
Assistant Attorney General

¹ Amendments to Section 7-19D-18 are being considered by the New Mexico Legislature during its 2014 session. House Bill 132 and Senate Bill 87 both seek to amend Section 7-19D-18. If passed, neither bill will affect any portion of this advisory letter or the issues raised by Senator Griggs or Representative Herrell. Both bills leave untouched the language in Section 7-19D-18(B) that precludes a municipality from subjecting the imposition of a municipal hold harmless gross receipts tax to referendum.