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OPINION
OF
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Opinion No. 13-01

BY: Zachary Shandler
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TO: The Honorable Hector Balderas
New Mexico State Auditor
2540 Camino Edward Ortiz, Ste. #A
Santa Fe, NM 87507

QUESTION:

Is the Town of Cochiti Lake ("Town") subject to certain provisions of the state's public money statutes, specifically NMSA 1978, Sections 6-10-10, 6-10-36 and 6-10-44?

CONCLUSION:

Absent the promulgation of a rule by the New Mexico Department of Finance and Administration ("Department" or "DFA"), the Town is not subject to the limitations found in NMSA 1978, Sections 6-10-10, 6-10-36 and 6-10-44.

BACKGROUND:

NMSA 1978, Sections 6-10-10, 6-10-36 and 6-10-44 generally limit investments of a local public body to bank deposits, obligations of the United States and New Mexico local governments, and obligations collateralized or backed by the U.S. government. Based on the information available to us at this time, we understand that the Town has been investing some of its funds in other instruments, and since the Department views the Town as a local public body, those investments have resulted in a negative "finding" on the Town's annual audit.

ANALYSIS:

The Pueblo of Cochiti owns land in north central New Mexico. It has leased and sub-leased some of that land to private citizens over the years. In 1970, some of the leaseholders organized together to adopt a charter to create the Town of Cochiti Lake. See Charter of the Town of Cochiti Lake (Aug. 18, 1970). The town charter created a unique entity because the town did not own its land. The Charter stated: "The Town is hereby delegated the governmental and proprietary powers of the Pueblo within the territory of the Town...." Id. at Art. IV, § 400 (emphasis added). The charter created a self-government framework including the creation of town officers and a "town treasurer" with authority to "[d]eposit all monies received ... as may be designated by resolution of the Assembly and in compliance with all other applicable laws." Id. at Art. VIII, § 802(b).

In 1985, the state legislature enacted the Leasehold Community Assistance Act, NMSA 1978, Sections 6-6A-1 to -5 (1985) ("LCA Act"). The LCA Act assigns a name to entities such as the Town – "leasehold community." See id. § 6-6A-1 (1985). A "leasehold community" is defined as a community with a mayor-council government and "located on an Indian pueblo on lands leased from that pueblo." NMSA 1978, § 6-6A-2 (1985). This makes it "a political subdivision of the Pueblo." See N.M. Att'y Gen. Advisory Letter (Aug. 27, 1996) (a leasehold community's gross receipts tax is not considered state governmental gross receipts tax). It is "not a state agency, institution, instrumentality or a political subdivision of the State...." Id.

The New Mexico Court of Appeals has stated: "The upshot of two hundred years of federal legislation, federal case law and state case law, is that Indian country is no longer absolutely off limits to state jurisdiction...." State v. Atcitty, 2009-NMCA-086, ¶ 14, 146 N.M. 781, 215 P.3d 90. "The mechanism used to open - or shut - the door and the extent to which it may be opened is of necessity dependent on the legal and factual framework present in any given situation." Id.

The LCA Act imposes conditions on a leasehold community's receipt of certain state funding. If a community chooses to receive this funding, the "leasehold community shall conform to the rules and regulations adopted by the [Department's] local government division." NMSA 1978, § 6-6A-4(D) (1985). The source of the state funding is the "leasehold community assistance fund." See NMSA 1978, § 6-6A-3(A), (B) (1985). "The purpose of the fund is to provide leasehold communities with assistance in meeting their operating budgets." Id. § 6-6A-3(A). "Prior to receiving any assistance from the leasehold community assistance fund, the governing body of the community shall agree to be bound by such rules and regulations promulgated by the local government division of the [Department]." Id. § 6-6A-3(C). It is our understanding that the Town receives this assistance and received approximately $128,900 in leasehold community assistance funds in its 2012-2013 budget. See Town's website, www.cochitilake.org.

The LCA Act authorizes the Department to oversee ten different financial parts of a leasehold community's budget. See NMSA 1978 § 6-6-3(C)(1)-(10) (1985). The ten parts are identical, or nearly identical, to the requirements imposed on a "local public body" under the Local Government Finance Act. See NMSA 1978, Section 6-6-2 (1957, amended through 2011). These parts include requiring the submittal of an annual budget, reviewing the budget, making corrections to the budget and ensuring disbursements match budget amounts. However, the LCA

Act has no express provision regarding the Department's oversight of the deposit, and subsequent investment, of a leasehold community's funds. There is no language that limits a leasehold community's investment authority.

We have been asked whether the following provisions of New Mexico's public money statutes are applicable to a leasehold community: (a) Section 6-10-10 (Deposit and Investment of Funds); (b) Section 6-10-36 (Public money deposits of certain governmental units; distribution; interest) and (c) Section 6-10-44 (Temporary investment of excess funds; federal bonds or treasury certificates eligible). The thrust of these statutes requires covered public entities to deposit and invest monies with local financial institutions or in government bonds and securities.

Sections 60-10-10, 6-10-36 and 6-10-44 do not appear to apply to a leasehold community. The term "leasehold community" is not mentioned. The plain language of these statutes uses terms such as "municipal treasurer" and "local public body" to describe the entities that need to follow these requirements. See Cooper v. Chevron, 2002-NMSC-020, ¶ 16, 132 N.M. 382, 49 P.3d 61 (statutory language should be given its plain meaning). The statutes define "local public body" for certain purposes as "all political subdivisions of the state...." NMSA 1978, § 6-10-10(H) (2008) (emphasis added); see also NMSA 1978, § 6-10-1.1(E) (2011) (defining "local governing body," for purposes of NMSA 1978, Ch. 6, Art. 10, as "a political subdivision of the state..."). As discussed above, a leasehold community is not a local public body or political subdivision of the state. Therefore, the plain language of these three statutes does not subject leasehold communities to the statutes' requirements.

Based on all of the above, we conclude that because leasehold communities are not local public bodies of the state, they are subject to Department rules and oversight only if they accept leasehold community assistance funds under the LCA Act. Consequently, they are not prohibited from investing in a variety of instruments, unless the Department's Local Government Division develops a valid rule governing deposits and investment instruments pursuant to its authority under the LCA Act. See NMSA 1978, §§ 6-6A-3(C), 6-6A-4(D) (1985). To date, the Division has not promulgated rules governing a leasehold community's deposits and investments. However, this does not mean the Division cannot adopt some type of rule in the future. Under the LCA Act, the Division may "with the approval of secretary of finance and administration, make rules and regulations relating to ... handling ... of public funds or in any manner relating to the financial affairs of the leasehold communities." NMSA 1978, § 6-6A-3(C)(10) (emphasis added). The Division could propose a rule through its rule-making and public comment process containing appropriate requirements and limitations to ensure the safety and returns of a leasehold community's funds (perhaps using Sections 6-10-10, 6-10-36 and 6-10-44 as a template). The Department Secretary could then review and approve the rule.

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