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April 29, 2016

The Honorable Mary Kay Papen
New Mexico State Senator
904 Conway Avenue
Las Cruces, NM 88005

Re: Opinion Request - Valuation of In-Kind Services

Dear Senator Papen:

You have requested additional guidance from the Office of the Attorney General regarding a 2011 Attorney General advisory letter, which addressed your inquiry into the legality of leasing county-owned property at below market rates to private organizations under the Anti-Donation Clause of Article IX, Section 14 of the New Mexico Constitution. *See* Letter from Zachary Shandler, Assistant Attorney General, to Senator Mary Kay Papen (Mar. 30, 2011) (“2011 AG Advisory Letter”). You now seek clarification and guidance pertaining to the valuation of in-kind services – specifically, “the extent to which the value of services provided by nonprofit health and social services organizations may be taken into account as in-kind contributions toward the value of space provided to them by units of local government . . . [and] advice as to the establishment of guidelines for the valuation of such in-kind contributions.” As discussed in more detail below, we conclude that the value of services can be consideration for the lease of property, in whole or in part, as long as the total consideration is reasonably equivalent to the value of the lease.

An exchange in which services rendered by a private nonprofit are treated as consideration for property leased from a unit of local government implicates the Anti-Donation Clause, which provides in relevant part, “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. A “donation” for purposes of the Anti-Donation Clause, is “a ‘gift,’ an allocation or appropriation of something of value, without consideration.” *Village of Deming v. Hosdreg Co.*, 62 N.M. 18, 28, 303 P.2d 920 (1956).

The Anti-Donation Clause does not preclude the use of services as adequate consideration in exchange for the lease of government property, and the legislature has expressly recognized the use of services as consideration in otherwise lawful property transactions with government entities. For example, in the context of the use of county buildings by nonprofit organizations with a history of service to sick and indigent persons, the state legislature has provided “that consideration be extended as real value recognition of the indispensable part these services contribute to the fabric of life in New Mexico.” NMSA 1978, § 4-38-13.2 (2005). More generally, the New Mexico State Board of Finance rules governing real property transactions authorized by statute expressly allow state agencies and local public bodies, including counties, to accept services as consideration for the lease of their real property. *See* 1.5.23.7(C), 1.5.23.10(B)(6) NMAC.

As noted in the 2011 AG Advisory Letter, in-kind services may be valued as complete consideration in exchange for space provided by units of local government, so long as the services are valued as adequate consideration for the value of the property. The State Board of Finance rules referenced above define “consideration” as “*something which is of a value at least equal to the real property interest being conveyed*, including but not limited to cash, another piece of real estate, *services*, or other form of compensation” (emphasis added). 1.5.23.7(C) NMAC. *See also* 1.5.23.10(C) NMAC (requiring rent or other consideration from a private entity at “fair market value,” with limited exceptions).

Absent any applicable law, regulation or policy to the contrary, a county or other unit of local government is not bound to any particular method of valuing services, as long as the results are reasonable and verifiable. An example of a market-based approach to valuing services is cost-based valuation – determining the real value of services based on the operating expenses of the nonprofit. A unit of local government may also value services by calculating the cost it would bear in providing identical services to those provided by the nonprofit in question. Alternatively, a unit of local government may utilize a value-based approach, allowing a non-profit to reasonably demonstrate the value of the services it provides to the community. The value claimed by the non-profit may then be compared to similarly situated service providers in order to verify the value of the services. While our office deems such methods of valuation appropriate under the law, these are not necessarily the only acceptable methods of valuation.

If we may be of further assistance, please let us know. 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,



James J. Torres
Assistant Attorney General