

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

February 3, 2020

Michael Padilla
State Senator
P.O. Box 67545
Albuquerque, NM 87193

Re: Opinion Request –Middle Rio Grande Conservancy District Gate Licensee Liability

Dear Senator Padilla:

You requested our opinion with respect to liability for the installation of gates on Middle Rio Grande Conservancy District (hereinafter the “District”) roads. Specifically, you inquired as to whether the District could require a licensee, who has previously obtained a license to install and maintain a gate on District roads, to indemnify the District against any claims arising out of the installation, operation, and existence of the gate. You also inquire as to whether this indemnity requirement is in the public interest. As explained in greater detail below, we conclude that the District may only require a licensee to assume limited liability for the construction and installation of such a gate.

Background

The Middle Rio Grande Conservancy District is a political subdivision responsible for carrying out a variety of functions related to water management in the Middle Rio Grande Valley.¹ As part of its mission to conserve and manage the Rio Grande River, the District performs regular maintenance of dams and irrigation canals, necessitating the use of a number of maintenance roads. Some of these maintenance roads, also called ditch bank roads, require the installation of gates so as to prevent unauthorized access and criminal activity. Upon a showing of need, local residents whose property abuts the boundaries of the District are allowed to request gate installations on

¹ On its website, the District explains that it “manages irrigation, drainage, and river flood control in the Middle Rio Grande Valley, promotes efficient and responsible water management, protects the environment, wildlife and endangered species in cooperation with other local, state and federal agencies, and provides multi-use recreational opportunities within the Middle Rio Grande Valley.” *Mission Statement*, Middle Rio Grande Conservancy District, <https://www.mrgcd.com/mission.aspx> (last visited May 2, 2019).

nearby maintenance roads, to afford greater protection against illegal activity. District rules require local residents to apply for and obtain a license prior to installing a gate. This requires a formal, notarized license agreement that is signed by the licensee and the District.

It is unclear whether the District is currently requiring licensees to indemnify the District in connection with the installation of gates at a licensee's request. Your opinion request quoted language that required licensees to indemnify the District for, "Any and all liability related to or arising from installation, construction, operation, or the existence of the gate." This language was not present in the District's Rule Number 28 ("Gate Request Policy"), nor was any other comparable language present. However, comparable language was indeed present in the example license agreement you provided to our Office.² Therefore, we will address in this opinion whether such language in a license agreement is enforceable.

Analysis

As a general proposition, indemnity clauses in contracts are enforceable in New Mexico. "[P]arties have the freedom to enter into contracts that exculpate one party from liability for its own negligence unless the agreements are 'violative of law or contrary to some rule of public policy.'" *United Rentals Nw., Inc. v. Yearout Mech., Inc.*, 2010-NMSC-030, ¶ 19 (quoting *Berlangieri v. Running Elk Corp.*, 2003-NMSC-024, ¶ 27, 53). This general principle extends to contracts to which a government entity is a party. See generally *City of Albuquerque v. BPLW Architects & Engineers, Inc.*, 2009-NMCA-081, ¶ 19 (upholding the validity of and requiring the indemnitor to fulfill its responsibilities under an indemnity provision against the City of Albuquerque) and *City of Artesia v. Carter*, 1980-NMCA-006, ¶ 3 (observing in a case involving a municipality that, "There is ... no issue involving the validity of indemnity agreements as a general proposition."). In construing indemnity provisions and considering their enforceability, courts recognize both "the public policy favoring freedom of contract and the public policy embodied in New Mexico's anti-indemnity statutes." *Holguin v. Fulco Oil Servs. L.L.C.*, 2010-NMCA-091, ¶ 9.

While indemnity provisions are generally enforceable, such terms in New Mexico construction contracts are expressly limited by statute:

A provision in a construction contract that requires one party to the contract to indemnify, hold harmless, insure or defend the other party to the contract, including the other party's employees or agents, against liability, claims, damages, losses or expenses, including attorney fees, arising out of bodily injury to persons or damage to property caused by or resulting from, in whole or in part, the negligence, act or omission of the indemnitee, its officers, employees or agents, is void, unenforceable and against the public policy of the state.

² This language generally required the licensee to indemnify the District against "any and all claims ... arising from or by reason of the negligent existence, construction, maintenance, repair, condition or use of any structures, accessories or encroachments authorized by this License or by the negligent exercise of the privilege conferred by this License."

NMSA 1978, § 56-7-1(A). As our Supreme Court observed with respect to older but similar statutory language, this statute “voids agreements which attempt to indemnify the indemnitee for liability resulting, *in whole or in part*, from the indemnitee's negligence.” *Sierra v. Garcia*, 1987-NMSC-116, ¶ 3 (emphasis in original). *See also J.R. Hale Contracting Co. v. Union Pac. R.R.*, 2008-NMCA-037, ¶ 61 (noting that Section 56-7-1(A) “bars enforcement of an indemnification clause in construction contracts on public policy grounds where the indemnification is based on the indemnitee's own negligence”). However, the same statute also allows indemnity provisions to the extent that they indemnify the indemnitee against liability arising from the acts or omissions of the indemnitor. *See* § 56-7-1(B)(1) (authorizing indemnity provisions in construction contracts to the extent that they require “one party to the contract to indemnify, hold harmless or insure the other party to the contract, including its officers, employees or agents, against liability, claims, damages, losses or expenses, including attorney fees, only to the extent that the liability, damages, losses or costs are caused by, or arise out of, the acts or omissions of the indemnitor or its officers, employees or agents”).

Beyond Section 56-7-1(A), no other statute appears to limit the District's ability to require indemnity provisions in license agreements. The statutes effectively creating and empowering the District, NMSA 1978, Chapter 73, Article 14 (1927, as amended through 2018), for example, contain no such limitations. Conservancy districts generally have broad authority “to construct and maintain main and lateral ditches, community ditches ... and any other works and improvements deemed necessary to construct, preserve, operate or maintain the works in or out of said district.” Section 73-14-39(A). Thus, we believe conservancy districts also have the corresponding authority to negotiate and enter into contracts to that end, except as otherwise limited by law.

As such, we conclude that the indemnity provision in the District's license agreement is enforceable to the extent that the provision would indemnify the District against the licensee's negligent “maintenance, repair, condition or use of” the gate. However, with respect to the construction and installation of the gate itself, the indemnity provision's enforceability is limited, to the extent that it indemnifies the District against the negligent act or omissions of the licensee, and not against claims arising out of the District's own negligence. *See* § 56-7-1(B)(1). One caveat here is that in the event of the District's attempt to seek indemnity in a case arising out of a license agreement, the Court would likely have the discretion of deciding whether or not to enforce the remaining portions of the indemnity provision. *See Rivera v. Am. Gen. Fin. Servs., Inc.*, 2011-NMSC-033, ¶ 55 (observing that, “When this Court determines that contract provisions are unenforceable we can either ‘strike the ... provisions in their entirety’ or reform the provisions ‘into a fair and balanced’ agreement.”) (*quoting Cordova v. World Fin. Corp. of NM*, 2009-NMSC-021, ¶ 39). *See also State ex rel. State Highway & Transp. Dep't v. Garley*, 1991-NMSC-008, ¶ 30.

As to your question of whether all signatories to a petition for the installation of a gate would be liable under an indemnity provision, the answer is definitively no. Pursuant to the express language of the license agreement, only the “licensee,” as defined in the agreement itself, would be liable to the extent outlined above. Local residents would not hold the license to install and operate the gate by virtue of signing a petition.

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Your remaining question inquires as to whether this indemnity provision serves the public interest. We submit that, consistent with the analysis above, the policy of the state with respect to the function of indemnity clauses in construction contracts is stated in Section 56-7-1 itself. That section states clearly that one-sided indemnity clauses that indemnify the indemnitee for its own negligence are void and unenforceable as against “the public policy of the State,” and that only those clauses that indemnify the indemnitee from acts or omissions of the indemnitor are enforceable. Section 56-7-1. Any contract provision to the contrary is in violation of the express public policy of the State.

Your request to us was for a formal Attorney General’s opinion on the matters discussed above. Such an opinion is a public document, not subject to the attorney-client privilege. Therefore, we may provide this letter to the public.

Sincerely,

A handwritten signature in blue ink, appearing to read "John Kreienkamp". The signature is stylized and cursive.

John Kreienkamp
Assistant Attorney General