IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

LIVING CROSS AMBULANCE SERVICE, INC.,

**Plaintiffs-Appellants/
Cross-Appellees**

v. **No. 35,298**

VALENCIA COUNTY REGIONAL EMERGENCY COMMUNICATIONS CENTER; VILLAGE OF LOS LUNAS,

**Defendants-Appellees/
Cross-Appellants,**

and

BOARD OF COUNTY COMMISSIONERS OF VALENCIA COUNTY,

Defendants.

PLAINTIFFS'-APPELLANT'S BRIEF IN CHIEF

CIVIL APPEAL FROM THE THIRTEENTH JUDICIAL DISTRICT COURT
The Honorable James L. Sanchez
Dist. Ct. No. D-1314-CV-2011-00512

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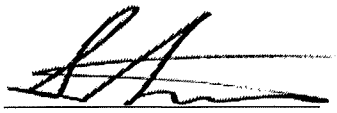
Rule 12-213(G) NMRA Statement of Compliance

I HEREBY CERTIFY that Plaintiffs'-Appellants' Brief was prepared using proportionally-spaced, 14-point, Times New Roman typeface in Microsoft Word 2010 word-processing program and that, pursuant to the limitations of Rule 12-213(F)(3) NMRA, its body, including headings, footnotes, quotations and all other text except the cover page, caption, table of contents, table of authorities, signature blocks, and statement regarding certificate of service, contains 9,497 words according to Microsoft Word 2016's word-count function.



Steven M. Chavez

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I. SUMMARY OF PROCEEDINGS

A. Brief Nature of the Case

The first issue in this case is whether non-home rule local governments have implied power to impose a "pay-to-play," non-regulatory fee on private ambulance companies for emergency 911 ("E-911") medical dispatch service. The second issue involves local government's' attempts to expand the scope of the meaning of a "donation" under the Anti-Donation Clause in order to create a justification for charging the dispatch fee, since they lack any express statutory authority to charge private ambulance providers for emergency dispatch.

The District Court ruled, without findings, that Defendants-Appellees have the power to charge the E-911 dispatch fee and that the Anti-Donation Clause prohibits the provision of E-911 dispatch to private ambulance providers without fee. [RP 435]. Plaintiff-Appellant, Living Cross Ambulance Services, Inc. ("LCAS") urges that the positions taken by the local governmental Defendant-Appellees and approved by the District Court are not only erroneous, but has the potential to seriously contort and undermine the well-established roles, duties, and powers of non-home-rule local governments among New Mexico governmental entities, as well as the separate and distinct statutory bases and regulation of E-911 services and ambulance services.

In this litigation, and as shown below, LCAS demonstrated to the District Court that the VRECC, as a Public Safety Answering Point (PSAP), E-911 dispatch center, is required by law to notify ambulance services of the need for ambulances and then initiate and direct the services required of ambulances, through dispatching, pursuant to E-911 state statute, funding, and regulation. LCAS further showed the District Court that LCAS's services and tariff expense/charge approval are governed by separate statutory and regulatory provisions. LCAS presented to the District Court, in its pleadings and arguments the various statutes and regulatory schemes governing the VRECC and governing ambulance services to show that the local governmental Defendants-Appellants do not have any express or implied power to charge a revenue enhancing, non-regulatory fee to LCAS for dispatch service, a service local governments are required to perform.

Although there are distinct and comprehensive statutory, regulatory, and funding frameworks for E-911 services and for ambulances services, ambulance carriage is expressly included as an object and purpose of dispatch in the chain of dispatch services. Charging a fee to private ambulance carriers for dispatch is neither expressly allowed nor contemplated in any statute, rule or framework. The local governmental Defendant-Appellees are required to perform dispatch services to ambulance carriers both to accomplish the legal E-911 duties of local government and to allow ambulance services to accomplish their duties and operations under

law. Accordingly, dispatch services cannot be a construed as a "donation" for purposes of the Anti-Donation Clause of the New Mexico Constitution.

The following brief history was detailed to the District Court in LCAS's Complaint [RP 1] and in its Memorandum Brief for Summary Judgment [RP 133]. Plaintiff-Appellant, LCAS, is a New Mexico for-profit corporation continuously engaged in the provision of ambulance service in Valencia County since 1987, and has been continuously certified as an emergency ambulance carrier for Valencia County, regulated by the New Mexico Public Regulation Commission ("NMPRC") and its predecessor agency, the New Mexico State Corporation Commission. [RP 185].

In 2006, the Village of Los Lunas, as the VRECC's fiscal agent for the Valencia Regional Emergency Communications Center (VRECC) received State funds through the NMDFA and local funding from member local governments to form and operate the VRECC, a Public Safety Answering Point (PSAP), which is a twenty-four-hour local communications facility that receives 911 service calls and directly dispatches emergency response services to the appropriate public or private safety agency for all of Valencia County. [RP 228]. Enhanced 911 Act, (E-911 Act) NMSA 1978, § 63-9D-3Q.

Each of the government entities in Valencia County pay into a fund for the continued operation of the VRECC through a joint power agreement (JPA) which

was executed by all the local government entities in the County and the VRECC in 2006. [RP 223]. Under the JPA, the participating local governments who have signed the JPA and paid into the VRECC's operating fund also have a seat on the VRECC;'s board of directors for the VRECC's oversight. [RP 228].

Soon after the VRECC commenced its operations in 2006, the Valencia County Fire Marshal, demanded that LCAS pay a fee for all current and past dispatch services through the year 2003. [RP 191 and 269]. It is undisputed that no local government city council or County Commission held any public hearings or adopted any ordinances regarding the ambulance dispatch fee. [TR III, 59-60].[1] LCAS refused to pay the dispatch fee, claiming that the VRECC and the local governments do not have the statutory authority to charge the fee, that the amount was arbitrarily and retroactively applied, and if the fee is legal, the local governments did not take any legislative action to approve the fee or delegate power to the VRECC to charge the fee. [RP 13]. In 2008, the VRECC through its attorney threatened to terminate all dispatch services to LCAS, if LCAS did not enter into the local governmentally imposed contract and pay the fee they set. If the fee was not paid by a certain date, Defendant-Appellees threatened to route all ambulance calls to LCAS. [RP 277]. LCAS filed the underlying declaratory action against the County, the Village of Los

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1 There are three transcripts in the record, and when referencing them, they will be cited as "TR I," "TR II," or "TR III."

Lunas, the VRECC, and asked the Court to declare (1) the rights of the parties, (2) that the VRECC and the JPA municipal and county members do not have the power under State law to charge the dispatch fee, (3) that the dispatch fee violates equal protection, procedural and substantive due process of law, and (4) that termination of dispatch service is an illegal attempt to coerce a contract, and indirectly regulate certificated ambulances in violation of the Motor Carrier Act. [RP 1]. LCAS also claimed that merely "routing calls" to LCAS is not only inefficient and potentially hazardous to both LCAS personnel and the public LCAS serves [TR I, 14-15] in the field, but that it is expressly prohibited by the E-911 Act. [TR I, 15, and RP 193], NMDFA E911 Rule, § 10.6.2.7 (NMAC 05-15-06) (A PSAP can only route calls to another PSAP, and only when there is a power outage).

B. Brief Summary of Course of Relevant Proceedings

LCAS filed its Verified Complaint and Petition for Declaratory Judgment and Permanent Relief stating all relevant facts and nature of all claims [RP 1], and the Defendants-Appellees filed their Answers to the Complaint. [RP 54, and RP 59]. Subsequently, Defendant-Appellee, Valencia County, ("County") filed a Motion for Judgment on the Pleadings, essentially claiming that Counties have authority to establish and operate their own ambulance service, and therefore it has authority to charge a fee and contract for said services. [RP 70]. LCAS then filed its Response

to Valencia County's Motion for Judgment on the Pleadings, arguing that the County misinterpreted and misapplied NMSA 1978 § 5-1-1 (1967, as amended, 1974). [RP 82]. Valencia County then withdrew its Motion for Judgment on the Pleadings under NMSA 1978 § 5-1-1. [RP 120].

(1) All Material Facts Are Undisputed and All Issues Were Thoroughly Briefed in Plaintiffs'-Appellants' Pleadings Supporting Summary Judgment

LCAS filed its Motion (with supporting exhibits) and Memorandum Brief for Summary Judgment, propounding 42-undisputed material facts and contending that all material facts were not in dispute. [RP 169 and 133 respectively]. As described in more detail below, LCAS preserved all issues raised in this appeal in its extensive pleadings.[2] Defendants-Appellees VRECC and Los Lunas filed their Response to LCAS' Motion for Summary Judgment and a Counter Motion for Summary Judgment. Defendants-Appellees did not respond to LCAS's 42-stated undisputed facts, but instead stipulated that "there were no genuine issues of material fact." [RP 332]. Defendant-Appellee Valencia County filed its Response to LCAS' Motion for Summary Judgment, and failed to respond to the 42-undisputed facts stated in

2 Memorandum Brief Supporting Summary Judgment [RP 1333]; Plaintiff's Reply to the Response of Valencia County to Plaintiff's Motion for Summary Judgment [RP 398]; Plaintiff's Reply to the Response of Los Lunas and VRECC to Plaintiff's Motion for Summary Judgment [RP 414].

LCAS' Memorandum Brief for Summary Judgment, restating 18 of LCAS's proffered undisputed facts. [RP 364]. LCAS then filed its replies to all Defendants-Appellees' Responses and the Counter Motion for Summary Judgment filed by VRECC and Los Lunas. [RP 398 and 414 respectively].

(2) The District Court Denied LCAS's Motion for Summary Judgment and Granted Defendants'-Appellees' Motion for Summary Judgment

On September 27, 2012, after oral arguments before the District Court on August 10, 2012, on the cross motions for summary judgment, the District Court found that there were no material facts in issue and it issued an Order which both denied LCAS's motion for summary judgment and granted partial summary judgment to the local governmental Defendants-Appellees on both issues of local governmental powers and the application of the Anti-Donation Clause. [RP 434]. The unresolved issue, whether or not the retroactive fees and the current fees violated Equal Protection and Due Process rights of LCAS, was scheduled for a bench trial at a later time. [RP 434].

The case was subsequently reassigned to the Honorable James L. Sanchez, District Judge. [RP 441]. LCAS filed its Motion Requesting Reconsideration of the Court's Order Granting Partial Summary Judgment. [RP 460]. After briefing on that Motion was complete, the District Court held oral arguments on August 8, 2012. [TR III]. Referring to the Court's previous ruling by District Judge William

Sanchez, the District Court stated that he "did not want to undo what Judge Sanchez did" [TR III, 62], but was willing to find that the manner in which the fees were charged, without legislative authority from the local governments, was unlawful. [TR III, 63]. LCAS filed a timely appeal from the final order that the District Court subsequently entered. The Village of Los Lunas and VRECC subsequently cross-appealed the final order of the District Court finding that the ambulance dispatch fees were charged unlawfully, without local legislative authority. [RP 545].

C. Summary of Facts Relevant to Issues Presented for Review

LCAS is certified as an emergency ambulance carrier in Valencia County by the NMPRC and has been regularly recertified by the NMPRC pursuant to statute since 1987. [RP 137]. LCAS is authorized to participate and receive funds, and does participate and receives funds, in all federal and state statutory programs applicable to ambulance carriage of sick, injured and indigent persons, including, without limitation, Medicare and supplemental Medicare insurance, Medicaid and Medicaid SALUD, Veterans Administration, New Mexico Workers Compensation, and the Valencia County Indigent Hospital Claims Fund. [RP 138]. LCAS is required by law to carry, and to provide medical care to all sick and injured, including indigent persons not covered by insurance, regardless of ability to pay. [RP 138]. NMPRC Motor Transp. Ambulance Rule § 18.3.14.8(A) (NMAC 01-01-05). LCAS is also

eligible to receive limited funds under the Emergency Medical Services Fund Act, NMSA 1978, §§ 24-10A-1 to -10 (2001) ("EMS Fund Act"), for medical equipment and supplies, and for personnel training. [RP 139].

VRECC is a Public Safety Answering Point (PSAP), began operation of its 911 emergency dispatch service in 2006. [RP 344-345]. VRECC was established by Joint Powers Agreement ("JPA") pursuant to the Joint Powers Agreements Act, NMSA 1978, §§ 11-1-1 to -7 (2009), among the County, Los Lunas, and the City of Belen in 2006. [RP 344]. The JPA was approved by the New Mexico Department of Finance and Administration ("NMDFA"). [RP 140]. In Article IV § B of the JPA, funding for VRECC is to come solely from its governmental members, and dispatch charges are to be paid exclusively by the local governmental members, based on the number of calls generated within each member's jurisdiction. [RP 143]. In addition, VRECC obtains additional funding from various state and federal public funding programs and grant sources, including the Enhanced 911 Fund. [RP 143].

LCAS cannot effectively provide rapid or efficient emergency ambulance service, without VRECC's provision of emergency 911 medical dispatch service. [RP 193]. Call routing only by VRECC to LCAS without dispatch services would result in significant delays in response time and significantly lower the levels of emergency ambulance service. [RP 193]. LCAS is a NMPRC-regulated EMS transportation responder, not a Public Safety Answering Point (PSAP) EMS dispatch

agency. [RP 142]. LCAS argued that the local governmental Defendants-Appellees' plan to merely route emergency calls to LCAS is not only inefficient and dangerous, but that the VRECC, as a PSAP, is only authorized to route calls to another PSAP, and only if there is a power outage. E-911 Act, NMSA 1978, §§ 63-9D-1 to 11.1 (2005) ("E911 Act").

None of the local governments in Valencia County are home rule entities pursuant to N.M. Const. art. X, § 6 (1970) and New Mexico law. [RP 140]. VRECC is the only centralized Enhanced 911 PSAP that serves Valencia County and it functions, in part, to provide centralized 911 emergency medical dispatch communications to emergency response entities for the benefit of the sick and injured citizens of Valencia County, including indigent citizens. [RP 140, 141].

It is undisputed that no local government in Valencia County has been issued a certificate from the NMPRC to operate an ambulance service. [RP 85].[3] Therefore, Valencia County and all local governments in Valencia County rely solely on private certificated ambulance carriers certified by the NMPRC for the provision of ambulance carriage. [RP 88-92].

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3 Note that the local government entities attempted to convince the District Court, in a "Motion for Judgment on the Pleadings" [RP 70] that because they had no authority to operate ambulance carriage, that NMSA 1978, § 5-1-1 is a grant of authority to contract for such services. However, after LCAS filed its Response Motion [RP 82], the County withdrew its motion with regard to its interpretation of § 5-1-1. [RP 122].

In December 2006, acting on behalf of the County and VRECC, the County Fire Marshal sent LCAS a bill for past and present medical dispatch services from 2003 through 2006, totaling $147,029.00. [RP 143-144]. The undisputed stated purpose of the dispatch fee imposed by Defendants-Appellees is to allow VRECC to "build up a reserve" for the VRECC. [RP 272]. In 2008, the VRECC's attorney threatened to terminate dispatch service to LCAS if LCAS did not enter into a contract to pay a dispatch fee. [RP 275]. The only legal justification asserted by the local governmental Defendants-Appellees for charging the dispatch fee is the contention that dispatch to LCAS without charge violates the Anti-Donation Clause of the New Mexico Constitution. [RP 145].

D. Standard of Review

There are no material facts in dispute. [RP 434]. Faced with competing Motions for Summary Judgment, the District Court sided with the local governmental Defendant-Appellees' interpretation of the law. Thus, this appeal solely presents questions of law based on undisputed facts. Accordingly, this appeal involves a de novo standard of review. *Garcia v. Dorsey*, 2006-NMSC-052. ¶13, 140 N.M. 746, 747. See also, *State v. Rowell*, 1995-NMSC-079, ¶8, 121 N.M. 111, 114, (1995) ("We review questions of law de novo."). The construction of a statute is a matter of law that the Court reviews de novo. See *In Re State of Armijo*, 2000-

NMCA-008, ¶5, 128 N.M. 565, 567. Although the Court in its review accords deferential review to facts found by the trial court, see *Strata Prod. Co. v. Mercury Exploration Co.*, 1996-NMSC-16, 121 N.M. 622, 627, the relevant facts here are not in dispute, and the District Court made no factual findings.

II. ARGUMENTS

A. The District Court Erred in Concluding that the Defendants-Appellees Possess the Power Under State Law to Charge a Dispatch Fee to Private Certificated Ambulance Carriers for Emergency Medical Dispatch Service

The District Court, without making any findings, ruled that the local governmental Defendants-Appellees have the power to charge LCAS for dispatch service. The Court did not declare the source of local governmental Defendants-Appellees' power. [RP 434]. LCAS respectfully urges that the Court erred in its legal conclusion, but that the District Court's ruling is also inherently vague without findings or discussion – both because of the vague language used by the Court, and because of the specific arguments presented and record made by local governmental Defendant-Defendants-Appellees in this case.

LCAS argued to the District Court in its pleadings and in oral arguments that, because the dispatch fee is non-regulatory in nature, and because its' purpose is to raise general revenue, the local governmental Defendants-Appellees must identify an express legislative grant of authority to lawfully charge the fee. [RP 156-160 and

TR I, 5:23-24]. Instead of identifying any express grant of statutory authority, however, the local governmental Defendants-Appellees admitted in their Motion for Summary Judgment that they do not have any express statutory authority to charge the revenue enhancing dispatch fee to LCAS. [RP 322-323]. Nevertheless, the local governmental Defendants-Appellees broadly argued that, because the E-911 Act is silent as to the manner by which local governments pay for the VRECC's operating costs, they have "implied power" to charge any private ambulance company the dispatch fee. [RP 322-323]. In addition, the local governmental Defendants-Appellees erroneously misconstrued their legitimate power to enter into contracts as a source of power to impose the fee on LCAS involuntarily. [RP 329 and 484]. LCAS argued to the District Court that equating local governments' power to enter into contracts as a source of power to charge a fee for dispatch services is irrational. [RP 473].

LCAS has consistently argued throughout this protracted litigation that, because the dispatch fee is designed and used to raise revenue for the VRECC, local governmental Defendants-Appellees must both possess and identify express statutory authority to charge the revenue-enhancing dispatch fee. LCAS argued that, for the local governmental Defendants-Appellees to have an implied power to collect the dispatch fee, under New Mexico law, they must first have an express power to charge the fee. [RP 418, TR III, 51:13-18]. Because neither the local governmental

Defendants-Appellees nor the District Court ever identified an express or clear source of power, LCAS is forced in this brief, as it did below, to argue a negative—that there is no statute that confers upon the local governmental Defendants-Appellees the power to charge the revenue-enhancing dispatch fee to a private ambulance carrier. When Defendants-Appellants stipulated that they did not have express legislative authority in any statute to charge a dispatch fee to raise revenue, the District Court should have granted LCAS' Motion for Summary Judgment and found that the local governmental Defendants-Appellees do not have authority to charge the asserted fee to LCAS. The District Court erred by failing to do so. All the following issues were thoroughly briefed by LCAS below, similarly to the briefing here.

(1) Defendants-Appellees Must Have Express Statutory Authority to Raise Revenue with a Dispatch Fee

VRECC, as a Joint Powers Agreements Act entity, has only those powers that are common to all of its members. NMSA 1978, § 11-1-3 (2009). [RP 18]. None of the local governmental entities forming VRECC are home-rule entities pursuant to N.M. Const. art. X, § 6 and New Mexico law.[4] [RP 140]. There is a large body of

[4]The distinction in legal authority between home-rule and non-home-rule municipalities is detailed in *State ex rel. Haynes v. Bonem*, 1992-NMSC-062, ¶¶ 8-13, 114 N.M. 627, 630-31. In general, non-home-rule "municipalities in the state depended on the state legislature for their power to act," whereas a home-rule

consistent New Mexico case law brought to the District Court's attention establishing that non-home-rule municipalities "exist only by virtue of statutory creation and have only such power as statutes expressly confer." *Sanchez v. City of Santa Fe*, 1971-NMSC-012, ¶ 6, 82 N.M. 322, 323. ("*Sanchez*"). *Accord, City of Albuquerque v. New Mexico Pub. Regan Comm'n*, 2003-NMSC-028, ¶ 3, 134 N.M. 472, ("*City of Albuquerque*"); *State ex rel. Haynes v. Bonem*, 1992-NMSC-062, ¶¶ 8-13, 114 N.M. 627, 630-31. Furthermore, "[a] county is but a political subdivision of the State, and it possesses only such powers as are expressly granted to it by the Legislature, together with those necessarily implied to implement those express powers." *City of Albuquerque*, 2003-NMSC-028, ¶ 3 (bracketed language in original) (quoting *El Dorado at Santa Fe, Inc. v. Bd. of County Comm'rs*, 1976-NMSC-029, ¶¶ 6-7, 89 N.M. 313, 317. *See also* NMSA 1978, § 4-37-1 (1975) ("All counties are granted the same powers that are granted municipalities except for those powers that are inconsistent with statutory or constitutional limitations placed on counties").

It is a well-established rule of law in New Mexico that, within the limitations placed on non-home-rule governmental entities, implied power can only arise from express power. *City of Albuquerque*, 2003-NMSC-028, ¶3 (quoting *El Dorado at*

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municipality may "exercise all legislative powers and perform all functions not expressly denied by general law or charter." N.M. Const. art. X, § 6(D).

Santa Fe, Inc. v. Board of County Comm'rs, 1976-NMSC-029, ¶6, 89 N.M. 313, 551. Moreover, and just as importantly, imposition of taxes, fees and charges in particular, requires express authorization. "The power [of a non-home-rule municipality] to tax is never inferred." *Sanchez*, 1971-NMSC-012, at ¶6 (a Declaratory Judgment Act case, holding that a municipality lacked authority to impose a development fee on private developers).

(2) Defendants-Appellees Cannot Rely on Police Powers to Raise Revenue

As local governments, the Village of Los Lunas and Valencia County certainly possess police powers. But the local governmental Defendants'-Appellees' police powers do not provide a source of power to impose an involuntary dispatch fee on private ambulance carriers, because the fee is not for any regulatory purpose. To legally invoke their police powers as a basis to charge the fee, the fee must be imposed to further legitimate regulation, not revenue. *City of Lovington v. Hall*, 1961-NMSC-021, ¶4, 68 N.M. 143, 145, (holding invalid municipal license fees enacted without express authority for revenue). *Accord*, *Town of Mesilla v. Mesilla Design Ctr. & Book Store, Inc.*, 1962-NMSC-156, ¶¶ 9-11, 71 N.M. 124, 130-31 (holding invalid a city tax imposed for revenue, rather than for licensing).

The undisputed facts in this case clearly demonstrate that the dispatch fee is being imposed to "build a reserve" for the VRECC. [RP 272]. Defendants-Appellees

are essentially levying a tax on private ambulances without lawful authority and without voter approval. In addition, as discussed separately in the following section of this brief, the local governmental Defendants-Appellees have no legal authority to regulate ambulance services and are thus pre-empted from even asserting that the imposed dispatch fee is related to regulation.

Because the dispatch fee is not imposed for any regulatory purpose, the local governmental Defendants-Appellees cannot legitimately rely upon their police powers as authority for charging the dispatch fee or for the collection of revenue. Local government simply cannot use police powers for the collection of revenue. See *City of Lovington v. Hall*, 1961-NMSC-021, ¶14, 68 N.M. 143, 145 (holding invalid municipal license fees enacted without express authority for revenue.) In addition, it is also undisputed that the local government entities who created the JPA did not even attempt to delegate to the VRECC any authority to impose any fees to private ambulance providers. [RP 224-231] The 2006 JPA is silent on charging ambulance carriers for dispatch. The JPA, however, expressly authorizes the VRECC to charge a fee to the participating local government members that are served by the VRECC with E-911 services. [RP 224-231].[5] LCAS reiterates, however, that even had the local governments attempted to delegate to the VRECC

5 As shown in the next subsection, this is consistent with the E-911 Act, because it expressly contemplates that local governments are too consolidate their resources to pay for a PSAP in the county which it operates.

the power to impose a fee upon LCAS, that delegation would have been without legitimate statutory authority, since the participating local governments, themselves, lack that statutory authority.

The only traditional express powers granted to local governmental entities to impose fees or charges are in the form of properly enacted taxes or business regulation. However, Taxation requires, legislative authorization, voter approval, meet equal protection and due process considerations as well. *Waksman v. City of Albuquerque*, 1984-NMSC-114, ¶¶7-8. The local governmental Defendant-Appellees have argued consistently throughout this case, however, that the fee imposed for 911 emergency dispatch service at issue here is either intended to recoup an alleged "donation" of emergency dispatch services to LCAS or to build revenue reserves for the VRECC. It is not, in either form or substance, a regulatory fee. *See generally* NMSA 1978, § 3-38-1 to -6 (1993) (municipal licensing and business activities). In any event, as discussed above, "[t]he power to tax is never inferred." *Sanchez*, 82 N.M. at 324, 481 P.2d at 403. And, under law, any fee must also be rationally related to the cost of administering the license program or regulating the entity licensed. *City of Lovington*, 1961-NMSC-021, ¶14; N.M. Att'y Gen. Op. No. 69-72 (July 7, 1969).

(3) LCAS is Regulated Exclusively by the NMPRC

In New Mexico, ambulance services are certified, and regulated exclusively by the NMPRC under the Motor Carrier Act, NMSA 1978, §§ 65-2A-1 to -40 (2009), and Ambulance Standards Act. NMSA 1978, § 65-2A-3(H) (2007) & -4 (2003); NMSA 1978, § 65-6-2(D) (1999) & -4 (1974). Nothing in either Act grants any power of regulation to a local governmental entity, and any power to regulate arguably granted under other authority is expressly denied insofar as the "rates and service" of a common carrier ambulance service. See NMSA 1978, § 65-2A-39(B) (2003).

The fee or charges for 911 emergency dispatch at issue in the present case are alleged by the local governmental Defendants-Appellees to recoup a "donation" of governmental services and were originally intended to build an unspecified "reserve" of funds, and the local governmental Defendants-Appellees are expressly denied the power to regulate LCAS. Accordingly, the asserted fee or charges for 911 dispatch services in this case cannot fall under any statutory municipal power to license or regulate a business. *Cf.* NMSA 1978, § 3-38-1 (1981). Nor can the asserted fee or charges for 911 dispatch services in this case fall under a municipal power to register businesses, since registration fees are statutorily limited to $35.00 annually. NMSA 1978, § 3-38-3 (1981).

(4) The E-911 Act and the EMS Regulations Require VRECC's Operating Costs to be paid by Local Governments and these Provisions Require VRECC to Provide Dispatch to Ambulance Providers

The State E-911 and EMS statutory schemes place the responsibility for funding PSAPs like VRECC solely on local governmental entities. While the EMS Act and the E-911 Act, NMSA 1978, §§ 63-9D-1 to 11.1 (2005), and the regulations promulgated pursuant to these statutes, expressly and thoroughly regulate the medical emergency dispatch activities of entities such as VRECC, there are no statutory or regulatory provisions whatsoever, addressing or even implying, that EMS dispatch services can impose a fee upon private ambulance services, require them to provide their own dispatch service, or deliver to them a lesser level of the medical emergency dispatch service than any other entity. VRECC admits that it received full funding from the State for the equipment and physical plant necessary for the dispatch service that it supplies. [RP 419]. LCAS receives no such funding. In addition, the local governmental Defendants-Appellees admit that all their contemplated approved funding sources are from local governments, State sources, and grants. [RP 345, and 350] ("Emergency Response End-to-End System," depicting these exclusive sources only).

LCAS argued below, and it urges here that under NMDFA E911 Rule, § 10.6.2.8(A) (NMAC 05-15-06) "emergency medical services" clearly contemplates and includes private emergency ambulance providers. The NMDOH

EMS Act regulations (which expressly govern PSAPSs such as VRECC) require VRECC to provide a fully specific type of medical emergency dispatch service to all emergency responders, including ambulance services. In addition, under the E911 Act and the NMDFA regulations thereunder, VRECC bears the responsibility and obligation for 911 emergency dispatch services, medical and otherwise, specifically including the delivery of "emergency medical services" and is expressly required to extend its dispatch services "supplemental services ... performed by others, such as private ambulance companies." NMDFA E911 Rules, § 10.6.2.8(A) (NMAC 05-15-06).

As the state agency charged with administering the E911 Act, the NMDFA is the primary authority for determining appropriate E-911 service funding under the E911 Act and State Governmental E-911 programs. The NMDFA E911 Rules, § 10.6.2.8(A) (NMAC 05-15-06), provides the policy backdrop of support for the statutory proposition manifested in the E-911 Act, NMSA 1978, § 63-9D-4, that VRECC's operational costs are the responsibility of the local governments within the VRECC's jurisdiction. Even when private emergency responders, such as LCAS, are in the chain of emergency medical providers in the VRECC's jurisdiction, the financial responsibility still expressly rests with government to pay all operating costs of VRECC. There is no statutory authority otherwise, and the Defendants-Appellants have not pointed to any.

In the context of E-911 requirements and delivering dispatch services, NMAC §10.6.2.8 states in full:

> A. In New Mexico, *the responsibility and authority for delivering emergency medical services*, public fire protection, and law enforcement generally rests with the state, counties, and municipalities. *This is true even when supplemental services are performed by others, such as private ambulance companies* or independent public authorities and non-profit organizations with limited internal fire protection and security forces.
>
> B. An E911 telephone emergency system provides:
> (1) expansion of the capabilities of the basic 911 emergency telephone number; (2) faster response time, which minimizes the loss of life and property; (3) automatic routing to the appropriate public safety answering point; (4) immediate visual display of the telephone number, name, and address or location of the calling party; and (5) identifies callers, curtailing abuse of the emergency system. (Emphasis added).

The E-911 requirements of NMAC § 10.6.2.1 to 17, are designed to carry-out the provisions of the E-911 Act and "to assist in the development, operation and maintenance of a reliable, uniform E911 system." *See* NMAC § 10.6.2.6. In addition, the NMDOH EMS Bureau Certification Rules expressly require the local governmental Defendants-Appellees to provide E-911 medical dispatch to emergency ambulance responders. *See* NMDOH EMS Bureau Certification Rule 7.27.10.15. (NMAC - N, 3/15/2010). Thus, both NMAC §10.6.2.8 and 7.27.10.15 requires local governments to provide dispatching ("delivery") to emergency services, even when those services are provided by "private ambulance companies."

Significantly, neither these rules nor in the E-911 Act itself, are there any

provisions which require private ambulance companies to pay for the emergency dispatch service that local government is required to provide, or that allow the local government to charge the private ambulance services for emergency dispatch service. Contrary to the local governmental Defendants'-Appellees' arguments, the E911 Act and the NMAC rules contain no authority, express or otherwise, that permits Defendants-Appellees to "charge a fee to anyone utilizing that service" as they claimed in VRECC and Los Lunas' Motion for Summary Judgment. [RP 11]. Indeed, the stated policy is exactly the opposite. The E911 Act expressly and squarely places the burden to fund VRECC's operational shortfalls on the local governments within the jurisdiction VRECC serves even when "ambulance services" "are performed by others." NMAC §10.6.2.8. [RP 161-163 and RP 475-476].

Because there is no express legislative grant of authority or power that allows the local governmental Defendants-Appellees to impose the dispatch fee or charge for provision of 911 emergency dispatch services to LCAS, and because VRECC's funding is the express and sole responsibility of the local government as provided by statute and rules, the local governmental Defendants-Appellees cannot lawfully impose a fee upon private ambulance carriers under New Mexico law for providing emergency dispatch service.

B. The District Court's Ruling That N.M. Const. Art. 9 §14, Prohibits The Provision of Emergency Dispatch Service to Private Certificated Ambulance Carriers Without Compensation Is Contrary to Well Established Law.

In its decision concluding that the provision of emergency medical dispatching to LCAS violates the Anti-Donation Clause, the District Court did not explain or cite to any case law which might support its ruling. To the extent that the District Court relied on the case law proffered by the local governmental Defendants-Appellees in support of their contentions, LCAS respectfully urges that the District Court erred. None of the Anti-Donation Clause authorities proffered by the local governmental Defendants-Appellees below support the conclusion of the District Court in this case. LCAS showed below, and will show here, that the local governmental Defendants-Appellees' position and the conclusion of the District Court are contrary to well-established law involving the Anti-Donation Clause.

Nevertheless, the local governmental Defendants-Appellees convinced the District Court that the governmental provision of emergency dispatch service is an unconstitutional donation to a regulated private company, like LCAS, who is statutorily required to deliver emergency services initiated by E-911 dispatch. In making this strained and legally invalid argument, the local governmental Defendants-Appellees generally asserted that, because LCAS relies on VRECC's statutorily required and regulated dispatching to carry-out its statutorily required, administratively governed, and certificated duties of picking up and transporting sick

and indigent persons in Valencia County, LCAS is receiving an impermissible gift or donation from the VRECC without any consideration.

The local governmental Defendants-Appellees contend that their dispatching service is a donation of the same kind as was struck down in *State ex rel. Mecham v. Hannah*, 1957-NMSC-065, 63 N.M. 110 ("*Hannah*"). [RP 325]. *Hannah*, however, is a readily distinguishable case, in which the New Mexico Supreme Court found that direct subsidies by the State to drought-stricken ranchers for their own and sole benefit violated the Anti-Donation Clause. In striking down the subsidy program, the *Hannah* Court did find that the subsidy program served an important public purpose. Nevertheless, the Court specifically found that: (1) the subsidy program was a "direct grant of state money;" (2) that the program did not serve sick and indigent persons; and (3) that the state received no programmatic consideration for the subsidy. *Hannah*, ¶¶ 31 and 40. In addition to direct subsidies, *Hannah* did not involve the provision of care to the sick and indigent, and the recipients provided no services within a broader legislatively defined program like emergency medical care. In addition, unlike dispatching, the subsidy program in *Hannah,* was not designed to meet a statutory duty of government. The Court in *Hannah*, as in virtually all New Mexico cases dealing with allegations of Anti-Donation Clause violations, primarily focused not on the benefit to the recipient, but on the

governmental actions and the programs alleged to have made gifts or donations to private entities.

(1) Any Benefit LCAS Receives from Dispatch Service is Merely Incidental to VRECC's Fulfillment of its Legal Duty to Dispatch Ambulances of Which Also Benefits the Local Governments Because Private Ambulance Companies Are Providing a Service Which the Local Governments Otherwise Cannot Provide

To be prohibited by the Anti-Donation Clause, the governmental action at issue (dispatching) must solely benefit private entities, and must not be a benefit merely incidental to a broader public program or objective. *See State ex rel. State Park & Rec. Comm'n v. New Mexico State Auth.*, 1966-NMSC-033, 76 N.M. 1 (a declaratory action case approving municipal construction of a dock and concession facilities for private vendors at a public park because the program was part of a broad program for State services). [RP 155].

The term "incidental benefit" is a legal term used in the analysis of an alleged donation, referring to whether the alleged donation is made directly to the private person for that person's sole benefit, or is simply incurred in the course of the fulfillment of a broader public program. Here VRECC's E-911 dispatching is mandated by state law, in which LCAS is simply an authorized participant and intended beneficiary. See NMAC, § 10.6.2.8(A) which acknowledges that the responsibility for delivering emergency medical services under the E-911 Act rests

with local government.

The fact that LCAS realizes a benefit (dispatching services) from the VRECC is unimportant to the Anti-Donation Clause analysis. That is, the Anti-Donation Clause applies "only where the 'aid or benefit' disclosed, by reason of its nature and the circumstances surrounding it, takes on the character as a donation in substance and effect" – it must be a direct donation that solely benefits private entities, and must not be a benefit merely incidental to a broader public program or objective. *State ex rel. State Park & Rec. Comm'n v. New Mexico State Auth'y,* 1966-NMSC-033, ¶¶ 47-50, 76 N.M. 1, 20-21.

The Anti-Donation Clause does not to apply in this case precisely because to meet one of its funding purposes, VRECC is legally obligated to dispatch ambulances. Dispatching is the intended purpose of its funding. Dispatching, including to ambulances benefits the community as whole. And in doing so, Defendants-Appellees are not making an investment in, or loan to, LCAS in any manner that runs afoul of the Anti-Donation Clause. *Hotels of Distinction W, Inc. v. City of Albuquerque,* 1988-NMSC-047, ¶¶1-7, 107 N.M. 257, 258-59.

The cost of VRECC's emergency dispatching service is incurred by the Defendants-Appellees to fulfill a legislatively mandated purpose:

> It is the purpose of the Enhanced 911 Act [63-9D-1 through 63-9D-11.1 NMSA 1978] to further the public interest and protect the safety, health and welfare of the people of New Mexico by enabling the development, installation and operation of enhanced 911

> emergency reporting systems to be operated under shared state and local governmental management and control.

E-911 Act, § 63-9D-2(B).

Ambulance providers, like LCAS, are within the chain of emergency responders. NMDOH EMS Certification Rules §§ 7.27.10.1 to 25 (NMAC 03-15-10). Funding for PSAPS, like VRECC, was established precisely because the legislature expressly found that enhanced E-911 dispatching provides "faster response time which minimizes the loss of life and property." E-911 Act § 63-9D-2(A)(2).

In *City of Clovis v. Southwestern Pub. Serv. Co.*, 1945-NMSC-030, 49 N.M. 270, the New Mexico Supreme Court again interpreted the Anti-Donation Clause, instructing that "it should be construed with reference to the evils it was intended to correct." Id ¶20. The Supreme Court in the *City of Clovis* case concluded that the Anti-Donation Clause is intended to prevent the investment of public funds in private enterprises, and that it is not intended to affect governmental services to the public or the accomplishment of governmental functions. See also *Harrington v. Atteberry*, 1915-NMSC-058, 21 N.M. 50 (a New Mexico Supreme Court case that distinguished between a county's direct provision of funds to a private corporation serving a public purpose, which is unconstitutional, and the county's use of private entities for performance of a traditional public function, which is permissible).

Although the local governmental Defendants-Appellees have argued that they have had to employ additional dispatchers so that they can dispatch to private ambulance companies [RP 334], they have not shown that these expenses are an investment of public funds in or to LCAS. It is disingenuous for the local governmental Defendants-Appellees to claim that the expense associated with dispatching to ambulances amounts to an illegal donation when dispatching is VRECC's primary function and duty under law.

As discussed above, the NMDFA administers the E-911 Act, NMSA 1978, §§ 63-9D-1 to 11.1 (2005). The NMDFA's rules under the E-911 Act, which govern VRECC's operation in all of its E-911 dispatching services, medical and otherwise, specifically states and recognizes that county government obligations in "delivering emergency medical services" through its dispatch services extends to "supplemental services...performed by others, such as private ambulance companies." NMDFA E911 Rules, § 10.6.2.8(A) (NMAC 05-15-06). In addition, it was shown to the Court that the NMDOH Certification Rules governing 911 emergency dispatch agencies like VRECC recognizes "certificated ambulance service" as "a publicly or privately owned entity holding a current certificate from the New Mexico public regulation commission that identifies it as an emergency response ambulance service." § 7.27.10.7(E). [RP 420].

VRECC has a legal duty to make provision for, and to dispatch to ambulance

carriers under NMAC § 10.6.2.8(A). The E-991 Requirements of NMAC § 10.6.2.8(A) are "deemed necessary to carry out the provisions of the Enhanced 911 Act, Sections 63-9D-1 et seq. NMSA 1978." See, NMAC, § 10.6.2.3. Dispatch to a private ambulance service is a rational, reasonable and ordinary consequence of satisfying VRECC's stated public purposes. As previously noted, NMAC, § 10.6.2.8(A) states in relevant part:

> "the responsibility...for delivering emergency medical services...generally rests with the state, counties, and municipalities. This is true even when supplemental services are performed by others, such as private ambulance companies."

VRECC's dispatch services clearly and expressly extend to private emergency certificated ambulance providers like LCAS, in order to satisfy its public service. VRECC cannot carry out its function or meet its legal duty without making provision for emergency dispatch to private ambulance companies as there are, under law, only private ambulance company carriers in Valencia County. [RP 137].[6] Conversely, LCAS cannot meet its legal duties to the public without dispatch service. Because dispatching to private ambulance carriers is required, as well as a necessary function of VRECC, dispatching to private ambulance carriers cannot reasonably be considered a donation under the Anti-Donation Clause. Furthermore, any benefits

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6 When this litigation commenced, LCAS was the only certificated ambulance carrier in Valencia County. Recently, the NMPRC granted authority to another private ambulance carrier, a matter of which is currently on appeal to the N.M. Supreme Court, in Docket No. S-1-SC-35590.

LCAS receives from this necessary reciprocal partnership is merely incidental to the broader E-911 goals---goals which are ultimately designed to benefit the public with safer, faster E-911 services.

It is undisputed that VRECC as a PSAP is a government program—a unified 911 emergency dispatch agency, designed to benefit the public. NMSA 1978, §§ 24-10B-1 to -12 (2003) ("EMS Act"). [RP 18]. It's funding arises from a broad public program designed to provide emergency assistance to members of the public, which necessarily includes dispatching, for the health, safety, and welfare of the State. NMSA 1978, § 63-9D-2(B) (2005). VRECC enjoys limited tort immunities, because "[e]nhanced 911 systems are within the governmental powers and authorities of the local governing body or state agency in the provision of services for the public health, welfare and safety." NMSA 1978, § 63-9D-10 (2005). VRECC's primary function is to provide dispatch service to a host of different public and private emergency responders, only one of which is LCAS, an entity also regulated for the health and welfare of the general public.

LCAS also operates within a similar framework, providing emergency care for the health, safety and welfare of the general public, including specifically, the sick and injured. The EMS Fund Act (the act which created the E-911 funding for VRECC) specifically acknowledges that an "ambulance service" is one of the traditional emergency responders entitled to governmental funding, so long as it

"routinely responds to an individual's need for immediate medical care in order to prevent loss of life or aggravation of physical or psychological illness or injury." NMSA 1978, § 24-10A-2.1(E)(1) (2001).

The purpose for provision of 911 emergency dispatch service to emergency responders is precisely to allow the local responders to have "faster response time, which minimizes the loss of life and property." NMAC § 10.6.2.8B(2). LCAS is a certificated, duly authorized and recognized by statute and regulation as an emergency medical provider. [RP 142]. Accordingly, under comprehensive and well-established law, any benefits to a private ambulance service such as LCAS resulting from the provision of 911 emergency dispatch service is merely incidental to the E-911 program and to the legal duties of VRECC to dispatch to ambulance carriers.

Finally, as argued in detail below in sub-section (3), because none of the local governments have the legal authority to operate their own ambulance service, nor do they possess a certificate from the PRC to do so, all ambulance services in Valencia County is provided by private ambulance companies like LCAS. No local governmental entity may operate or contract for its own ambulance service, if there is a certified ambulance service already established and serving that territory. NMSA 1978, § 5-1-1(A) & (B). [RP 4]. All the local governments in Valencia County receive a benefit from dispatching to LCAS—the provision of ambulance services.

Furthermore, Defendant-Appellees do not compensate private ambulance providers, including LCAS, for the provision of ambulance service.[7] Therefore, VRECC, the Defendants-Appellees, and the residents of Valencia County are the primary beneficiaries of VRECC's dispatching to private ambulance providers.

(2) ***Emergency Dispatching to Ambulances Satisfies the "Sick and Indigent" Exception of the Anti-Donation Clause***

In addition, both VRECC's E-911 services and LCAS's regulated ambulance services fall under what is commonly known as the "sick and indigent" exception to the Anti-Donation Clause. [RP 152]. While the general provisions of the Anti-Donation Clause prohibit donations by governmental entities to private persons, there are numerous express Constitutional exceptions to application of its prohibition. The first and most prominent exception is the "sick and indigent" exception, which expressly exempts from its prohibition, governmental payments and services provided to private persons or entities for the care and maintenance of sick and indigent persons. The sick and indigent" exception provides:

> Nothing in this section prohibits the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons.

N.M. Const. art. 9 § 14(A) (the "Sick and Indigent Exception").

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7 LCAS does however participate in the Valencia County Indigent Hospital Claims Fund program and guidelines, and similar programs. [RP 7].

Despite LCAS's extended briefing regarding the exception, the District Court, omitted any reference to the exception in this case. [RP 434]. LCAS, like all ambulance services, receives governmental payments for its services directly from the Valencia County Indigent Fund and from the EMS Fund. [RP 154]. The local governmental Defendants-Appellees have made no claim that funding to LCAS through the County's Indigent Fund constitutes prohibited donations to LCAS. The local governmental Defendants-Appellees seem to recognize that payments to LCAS from the County's Indigent Fund is not a gift or "donation" because it is part of a larger governmental program to care for the sick and indigent of Valencia County. For the same reason, E-911 dispatching is not a gift or "donation."

In *Humana of N.M., Inc. v. Board of County Comm'rs*, 1978-NMSC-036, ¶¶9-12, 92 N.M. 34, 35-36, a declaratory judgment action, the New Mexico Supreme Court specifically held that county payments under the County Indigent Health Care Act to private health care providers were exempt from the prohibition of the Anti-Donation Clause under the Sick and Indigent exemption of N.M. Const. art. 9 § 14(A). In the course of rendering that opinion, the Supreme Court held that the constitutional "sick and indigent person" exception should be read broadly for a "contemporaneous construction" to satisfy legislative standards for provision of health and indigent care of New Mexicans. *Humana*, 1978-NMSC-036, ¶11.

Similarly, the local governmental Defendants-Appellees did not dispute that

LCAS is legally certified and authorized by the NMPRC pursuant to the Ambulance Standards Act, NMSA 1978, §§ 65-6-1 to -6 (1999), precisely to transport sick and injured persons, regardless of ability to pay, within Valencia County to a place of treatment. The precise purpose of the Ambulance Standards Act is to provide uniform standards of design, equipment and operation of ambulances used in the transportation of the sick and injured, and to ensure the highest standards of competence in the ambulance drivers and attendants providing service to the public. NMSA 1978, § 65-6-3 (1974).

Therefore, if read broadly for a "contemporaneous construction" to satisfy legislative standards for provision of health and indigent care of New Mexicans as required by *Humana*, 1978-NMSC-036, ¶11, VRECC's dispatch to LCAS to perform LCAS's statutory and legal duties to carry the sick and indigent falls squarely under the sick and indigent exception of the Anti-Donation Clause.

(3) *LCAS's Provision of Ambulance Service is Sufficient Consideration Under the Anti-Donation Clause*

LCAS also argued to the District Court below and urges here that the provision of ambulance services in Valencia County is adequate consideration for dispatch service. [TR III, 8:4-25]. As discussed above, the Supreme Court has instructed that the term "donation" as used in the Anti-Donation Clause is taken in

its ordinary sense and meaning as a "gift," an allocation or appropriation of something of value, without consideration. *Village of Deming*, 1956-NMSC-111.

LCAS urges that its provision of ambulance carriage in Valencia County is sufficient consideration for dispatch service. Because LCAS holds a certificate to, and does, provide ambulance carriage and treatment service to any and all sick, and injured persons in Valencia County regardless of ability to pay or source of payment, including indigent persons who are not covered by insurance or any governmental program, VRECC and all the local government entities realize something of value for VRECC's dispatch service. [TR III, 8:4-25]. The local governmental Defendants-Appellees failed to acknowledge this significant fact but instead erroneously focused their constitutional arguments only on the benefits LCAS received from dispatch. [RP 365].

The local governmental Defendants-Appellees' myopic argument to the District Court entirely ignores the nature of LCAS's services to the County. They also ignore VRECC's own underlying function and legal duty to dispatch to ambulance carriers, the reason for VRECC's legal duty to do so, and the real beneficiaries of a more efficient dispatch system—the people of Valencia County. Because the provision of ambulance carriage in Valencia County is supported by private ambulance companies, including LCAS, the local governmental Defendants-Appellees do not have to pay for the provision of their own ambulance service or

contract and pay for such services. The provision of necessary ambulance service is fully adequate consideration for the local governmental Defendants-Appellees' provision of statutorily required dispatching to private ambulance services.

Finally, LCAS, is a tariff regulated entity whose tariff rate, which it must charge under law, is set by the NMPRC. LCAS's tariff determination includes no expense for payment of dispatch services. [RP 247-266]. Were LCAS required to pay for dispatch services, its tariff rates to the public and particularly to private medical insurance and to programmatically uncovered individuals, would be considerably greater. There is consideration to the County and the people of Valencia County requiring medical carriage, in the fact that rates to the public do not include a governmental charge for dispatch. Indeed, a governmental charge for dispatch services incorporated into an ambulance tariff would amount to a hidden County tax on its own residents that does not comply with any requirements for taxation.

There is a strong analogy between an ambulance tariff and a utility tariff, both of which are determined by the NMPRC in proceedings before the agency. Because utilities also include their costs in their rate base and charge a proportionately higher rate to the population as their costs increase, local governments by statute allow privately owned utilities easements and right-of-way to use publicly maintained streets and roadways at no charge. NMSA 1978, § 62-1-3 (1987). In addition, again

because of the inclusion of costs in rate base, under New Mexico common law, a tariff-regulated private utility company has a "right" to initially use public streets free of charge, subject to the right of the municipality to require the utility to relocate its lines and facilities when necessary because of changes in street locations or improvements in the public health and welfare interest, which may also be free of charge. *E.g.*, *Southern Union Gas Co. v. City of Artesia*, 1970-NMSC-086, 81 N.M. 654. These incidental benefits to utility companies are allowable under the Anti-Donation Clause, precisely because the increase in costs would be passed through to the public, and any incidental benefit is returned in consideration to the public.

LCAS's provision of NMPRC certificated ambulance carriage is sufficient reciprocal consideration for VRECC's dispatching, and does not violate the Anti-Donation Clause.

(4) Under N.M. Case Law, Emergency Medical Dispatching Does Not Conform to the Traditional Definition of a Prohibited Donation

In this case, the government action the local governmental Defendants-Appellees contend, and the District Court ruled, violates the Anti-Donation Clause, is the activity of emergency medical dispatch. As stated above, Defendants-Appellees liken dispatching to a subsidy because LCAS receives a benefit from it. However, case law interpreting the Anti-Donation Clause simply does not support

construction of such governmental action in the context of government programs as a "donation" to the private provider acting within the context of regulated governmental health care programs.

In the seminal case of *Village of Deming v. Hosdreg Co., 1956-NMSC-111, 62 N.M. 18*, the New Mexico Supreme Court interpreted the term "donation" in the Anti-Donation Clause of N.M. Const. Art. 9 §14. The term "donation" must be applied "in its ordinary sense and meaning as a gift, an allocation or appropriation of something of value, without consideration to a person, association or public or private corporation." *Id.* ¶ 36. The narrow definition given to the term "donation" by the Court in the *Village of Deming* case has never been expanded or changed. *See State ex rel. State Park & Rec. Comm'n v. New Mexico State Auth'y*, 1966-NMSC-033, 76 N.M. 1 (a declaratory action case approving municipal construction of a dock and concession facilities for private vendors at a public park). *See also State Ex Rel State Eng'r v. Lewis*, 2007-NMCA-008, ¶49, 141 N.M. 1 (following the *Village of Deming* case and the narrow definition of a prohibited donation). The alleged donations in the *Village of Deming* case were revenue bonds issued by a local government to attract private investment through construction, which also allowed private companies to operate and profit from the projects. Reviewing the government action, the Supreme Court held that even though the bonds create an

incidental benefit to private industry, the project or the bonds did not "take on character as a donation in substance and effect." *Id at* ¶37.

As the *Village of Deming* case instructs, in Anti-Donation Clause questions, the focus is and must always remain on the alleged donation, not upon the incidental benefits that private parties may receive from the government action. *See, e.g., City of Albuquerque v. New Mexico Pub. Regan Comm'n*, 2003-NMSC-028, ¶ 27, 134 N.M. 472 (municipal cost of relocation of underground utilities was a matter of public program and policy not prohibited as a "donation" to a private utility company under the Anti-Donation Clause); *Hotels of Distinction W., Inc. v. City of Albuquerque*, 1988-NMSC-047, ¶ 107 N.M. 257, 259 (no "donation" in a municipal development agreement with a private contractor – the Anti-Donation Clause does not apply where contracts benefit the community as whole so long as there is no investment in, or loan to, the private contractor). *See also State ex rel. Office of State Engineer v. Lewis*, 2007-NMCA-008, ¶¶49-51, 141 N.M. 1, (no donation or Anti-Donation Clause violation in the state purchase of junior water rights in order to settle extended water rights litigation).

New Mexico courts have commonly found that the Anti-Donation Clause is violated only when the state or local governments have made outright gifts of money or property to private interests, or have effectively relieved private persons and entities from obligations they would otherwise have to meet. *See*, e.g., *Chronis v.*

State ex rel. Rodriguez, 1983-NMSC-081, 100 N.M. 342 (tax credit to liquor licensees against taxes owed was an unconstitutional subsidy to the liquor industry); *State ex rel. Mechem v. Hannah*, 1957-NMSC-065, 63 N.M. 110, 314 P.2d 714 (1957) (appropriation to pay state's share of emergency feed certificates issued to livestock owners for the purchase of hay was an unconstitutional subsidy of the livestock industry); *Hutcheson v. Atherton*, 1940-NMSC-001, 44 N.M. 144 (finding unconstitutional a statute authorizing counties to issue bonds to be repaid by taxes in order to fund the building of public auditoriums to be used by a private corporation during celebration of the 400th anniversary of Coronado's exploration).

Under any reasonable interpretation of VRECC's operation of emergency dispatching, dispatch of emergency medical information is not an outright donation, subsidy, or gift, to a private person or entity. Nor is it the assumption of any private obligations of a private person or entity. Nor is it an investment in a private commercial entity. Emergency dispatching simply does not take on the character of a donation to LCAS in substance or effect. The local governmental Defendants-Appellees have never claimed that they are investing public funds directly for, or funneling any funds directly to LCAS. [RP 155 and 465]. It is undisputed that all of the public funds appropriated for the VRECC's operation are utilized to fulfill the stated purposes in the 2006 JPA, which necessarily includes the provision of

emergency communication and dispatch for Valencia County pursuant to the requirements of state law. [RP 345 and 350].

III. CONCLUSION

For all the foregoing reasons, Plaintiffs-Appellants respectfully requests that this Court reverse the District Court and find that Defendants-Appellees (1) do not have the power to charge LCAS a fee for dispatch service; and (2) that E-911 dispatching to LCAS by the VRECC does not violate the Anti-Donation Clause.

Respectfully Submitted,

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CERTIFICATE OF SERVICE:

I HEREBY certify, that pursuant to Rule 12-307.2(B), NMRA, on September 12, 2016, I sent a copy of this Pleading to the following counsel of record, via email:

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