



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

**IN THE MATTER OF THE PROTEST OF
VALUATION AD ASSESSMENT OF
IMPROVEMENTS FOR TAXATION AS
REAL PROPERTY OF NON-EXEMPT
ENTITY, AMERICAN CAMPUS COMMUNITIES, INC.,**

Appellant-Petitioner,

and

**REGENTS OF THE UNIVERSITY OF
NEW MEXICO,**

Interested Party-Petitioner,

v.

NO. S-1-SC-41215

BERNALILLO COUNTY ASSESSOR,

Appellee-Respondent.

APPELLEE-RESPONDENT'S ANSWER BRIEF

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ORAL ARGUMENT REQUESTED

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STATEMENT OF COMPLIANCE

Undersigned counsel hereby certifies that this brief was prepared in 14-point Times New Roman typeface and the body of this brief complies with the page limit requirement of Rule 12-318(G), with a word count of 10,972 words using Microsoft Word, version 2605

INTRODUCTION

This case is an appeal from a Decision and Order of the Bernalillo County Valuation Protests Board upholding the denial of an educational property tax exemption for residence facilities located on UNM's campus that are leased by the taxpayer, American Campus Communities ("ACC"). The Board's decision was affirmed by both the district court and the court of appeals.

The Board conducted a multi-day evidentiary hearing in which exhaustive evidence and testimony was received. The Board then applied well-established rules and standards in determining that the taxpayer did not establish a basis for an educational exemption. The district court and the Court of Appeals applied the substantial evidence standard of review in affirming the Board. All three tribunals applied the holding by this Court in *Albuquerque Alumnae Association v. Tierney*, 1933-NMSC-011, 37 N.M. 156.

ACC and UNM argue that dicta from *Albuquerque Alumnae* is controlling and that it requires a finding of an educational use of the property and the grant of an educational exemption. The argument is based on the assumption that any property owned by UNM is necessarily used for educational purposes without regard to the actual uses. The Assessor respectfully submits that adoption of that standard would upend, if not outright overrule, decades of applicable caselaw and would adversely impact statutes that are not at issue. Those principles include:

1. The distinction between ownership of property and use of property for purposes of the constitutional exemptions for educational and charitable uses. Caselaw has long established that those exemptions depend on the actual uses of the property. *Temple Lodge No. 6, A.F.&A.M. v. Tierney*, 1933-NMSC-013, 37 N.M. 178; *Georgia O’Keeffe Museum v. County of Santa Fe*, 2003-NMCA-003, 133 N.M. 297. ACC argues that ownership by a university alone establishes educational use, an argument directly at odds with these cases.

2. A fact-specific determination as to educational or charitable uses. *Temple Lodge No. 6, supra*, and numerous other cases.

3. Application of the standards for determining educational use as found in *CAVU Co. v. Martinez*, 2014-NMSC-029, 332 P.3d 287; *NRA Special Contribution Fund v. Board of County Commissioners*, 1978-NMCA-096, 92 N.M. 42; *Georgia O’Keeffe Museum, supra*.

4. The substantial evidence standard of review of administrative decisions. *Gallup Westside Dev., LLC v. City of Gallup*, 2004-NMCA-010, ¶ 10, 135 N.M. 30; NMSA (1978), § 39-3-1.1; Rules 1-074 and 1-075, NMRA.

5. Applicability of NMSA (1978), § 7-36-4, commonly known as the fractional interest statute that identifies leasehold interests of non-exempt entities in improvements located on land of exempt entities. ACC has not challenged the

statute, but application of the standard for which it advocates would vitiate the statute.

6. Possible impact on the Tax Increment for Development Districts Act, NMSA (1978), §§ 5-15-1 *et seq.*, which UNM relies on for development of its South Campus.

Following those standards allows case-specific determinations of educational and charitable uses that can result either in approval or denial of those exemptions, with full due process and appellate review, without upsetting established law and with no adverse impacts on taxpayers claiming such exemptions. All three of the lower tribunals in this case—the protest board, the district court, and the court of appeals—correctly applied these standards. The Assessor respectfully requests that this Court apply these traditional concepts to this case and that it decline ACC’s invitation to adopt a new standard at the cost of all of these authorities.

SUMMARY OF FACTS AND PROCEEDINGS

A. Summary of Proceedings.

The procedural history of this case is complex. The two residential complexes at issue were built between 2010 and 2012, but were considered by the Assessor to be exempt based on ownership of the improvements by UNM. In 2020, pursuant to a comprehensive ongoing review of exemptions, the Assessor reviewed the properties and determined that ACC had a taxable fractional interest in the

improvements based on either ownership by ACC of the improvements or on its leasehold interests in them. See NMSA (1978), § 7-38-4(C) (ownership or leasehold interest of nonexempt entity in improvements on land of exempt entity are subject to valuation and taxation). The Assessor, accordingly, created an account for ACC and placed the improvements on the tax schedule. The county treasurer issued tax bills for tax years 2012-2020 which, for both properties, totaled approximately \$6 million. (19 RP 4765).

ACC and UNM protested the valuations and assessments. The protest covered tax years 2012-2020. The Board conducted a multi-day evidentiary hearing from August 23-26, 2021, and issued its Decision and Order on December 9, 2021. The decision contains an in-depth review and analysis of the many issues and the exhaustive evidence received at the hearing. Much of the evidence and testimony presented at the hearing concerned ownership of the improvements, i.e., the buildings. The Board concluded that UNM owned the improvements and as such were exempt as property of the state. (RP 24, D&O ¶ 6.26). The Board further concluded that ACC's leasehold interest was a fractional interest under the fractional interest statute cited above and that that interest was subject to valuation and taxation. (RP 25-29, D&O ¶¶ 7.2-7.16).

ACC argued that its interest qualified for an educational exemption as well as a governmental exemption. The Board received evidence and testimony offered by

both parties regarding the claim of educational exemption. However, the Board declined to rule on the claim since ACC had never applied for an educational exemption. (RP 13, D&O ¶¶ 4.2.29-4.3.33). The Board then upheld the Assessor's valuations for the subject tax years. The Board declined to address ACC's claim of equitable estoppel based on its lack of authority over equitable remedies. (RP 15, D&O ¶ 4.2.40).

ACC and UNM appealed the Board's decision to district court, which docketed the appeal under No. D-202-CV-2022-00099. While that appeal was pending, ACC filed protests for tax years 2021 and 2022. The parties stipulated that the record from the first hearing would comprise the record for both 2021 and 2022. In addition, since ACC had filed a claim of educational exemption for 2022, the Board allowed supplemental affidavits to be filed by both parties regarding the claim of educational exemption. The supplemental affidavits together with the record from 2012-2020 would comprise the record for 2022. Accordingly, a second hearing was waived and the Board issued its second D&O on May 5, 2023. That D&O directly addressed the educational exemption.

The Board concluded that the use of the properties failed two of the three prongs of the *NRA* test: "the use of the Subject Properties is residential and is not directly, immediately, primarily, or substantially for educational use nor does the use embrace systematic instruction in any branch of learning." (RP ___, D&O ¶ 65).

The Board did find that the use of the properties does impart a substantial public benefit. (RP ___, D&O ¶ 57).

Petitioners appealed this D&O to district court, which consolidated the 2021 and 2022 protests with the existing appeal of the 2012-2020. The district court issued its Memorandum Opinion and Order on June 20, 2024. It applied the educational exemption standards from NRA and other cases as discussed below and found that substantial evidence supported the Board's decision. Petitioners appealed to the court of appeals which similarly conducted a substantial evidence review and affirmed the district court.

B. Summary of Facts.

Petitioners have presented a Summary of Facts that outlines the transactions in this case and that focuses largely on evidence of UNM's educational mission. The totality of the summary is such as to support their contention that the partnership between UNM and ACC embraces an overall educational use of the properties. The Assessor disputes the presentation for the reason that it fails to comply with the substantial evidence standard, which both courts below applied. That standard requires does not dispute the accuracy of the recitations, but does dispute the manner in which they are presented to this Court. This case was considered in both courts below according to an administrative standard of review. That standard requires that the reviewing court conduct a whole record review. The evidence is viewed in the

light most favorable to the agency's decision, but the court must also consider contravening evidence. *Gallup Westside Dev., LLC v. City of Gallup*, 2004-NMCA-010, ¶ 11, 135 N.M. 30. The agency decision here, i.e., the protest board, determined that the direct, immediate, primary and substantial use of the properties is for residential purposes. The Board, in fact, relying on *Alumnae Association*, found no educational use at all. Petitioners, however, have not presented evidence in the light most favorable to that decision. Instead, they have carefully selected transaction documents and statements that purportedly support educational uses. The Assessor, therefore, must present a fuller picture that was considered by the protest board and both lower courts.

This case concerns the interests of the taxpayer, American Campus Communities ("ACC"). The Assessor valued and assessed ACC's interests under the provisions of the fractional-interest statute of the Property Tax Code. That section provides that the interest of a nonexempt entity, i.e., ACC, in improvements on and of an exempt entity, i.e., UNM, is not exempt if the improvements are owned or leased to the non-exempt entity. NMSA (1978), § 7-36-4(B)(1). The statute itself is not in question in this matter.

1. ACC is a publicly-traded company with a primary economic interest.

Most of the testimony regarding ACC was provided by two of its representatives along with some testimony from UNM representatives. The two

ACC representatives were James Wilhelm, executive vice-president of ACC for public-private partnerships; and Steven Beinke, the senior vice-president for taxation at ACC. Between them, they described the nature of ACC and the subject properties.

ACC is a for-profit, publicly-traded Real Estate Investment Trust (“REIT”). (17 RP 4226, at 252:24-25). It is based in Austin, Texas and is traded on the New York Stock Exchange under the ticker symbol ACC. (17 RP 4174, at 186: 16-19). It has an enterprise value of approximately \$9-10 billion. (17 RP 4227, at 253: 6-7). The REIT does not pay income taxes, but rather distributes 100% of its taxable income to its investors. (17 RP 4245, at 326: 16-23).

The company is the largest owner/manager/operator of student housing in the country. (17 RP 4140, at 50: 11-14). It has 141,000 beds in 200 university communities, serving 90 university markets in 35 states. (17 RP 4174, at 186: 20-24). All of its properties are profitable. (17 RP 4228, at 259: 25 - 260: 2).

The student-residence properties in ACC’s portfolio fall into four categories: owned properties, on-campus participating properties (“OCP”), management for existing properties, and construction for third-party development. (17 RP 4246, at 332:14-24; 17 RP 4247, at 333: 1-11). The two categories relevant here are “owned” and “OCP.” Owned properties are off-campus residence facilities owned or leased by ACC. (17 RP 4247, at 334: 1-9). On-campus participating properties are located on campus and are leased by ACC. (Id., at 334-335: 24-1).

Lobo Village and Casas del Rio are in the nature of owned properties, not OCPP properties, even though they are located on the UNM campus. The difference between owned properties and OCPP properties is in financing. The OCPP properties are publicly-financed. (17 RP 4254-4255, at 364-365:22-2). The parties split the net income 50-50. (17 RP 4255, at 365: 4-13).

The UNM properties are funded by American Campus Equities (“ACE”). These are properties located on-campus but that are built or purchased by ACC with its equity funds. (17 RP 4247-4248, at 336-337: 22-12). ACC has 127 off-campus owned properties and 31 on-campus ACE properties. (17 RP 4248, at 339: 11-20). ACE properties have no public debt and ACC receives 100% of the revenue. (17 RP 4255, at 365: 15-21). The 31 on-campus ACE properties may or may not be exempt, depending on state law. (17 RP 4257, at 375: 8-21). The Assessor submitted discovery to ACC requesting a list of the exempt properties in its portfolio, which ACC refused to produce.

Lobo Village and Casas del Rio had a combined development cost of approximately \$80 million. (17 RP 4229, at 261:18-21). ACC was solely responsible for that cost, but it also pays rent to UNM. When asked how that made sense, Mr. Wilhelm responded:

American Campus, as we looked at that proforma and put together the development and budget, the rental rates, the operating budget, the cost of capital, because when we leased that project back, we get to collect student revenues. We pay expenses, we pay for capital improvements,

and then we have net operating income. And that net-operating income accrues to the company's P&L. And over a 70-year period of time, we judge that that provides sufficient return to justify the investment of the capital.

(Id., at 262: 11-20). The projected return on investment is found as exhibits to each ground lease and is listed over the 70-year total lease period. For Lobo Village, the 70-year cumulative return is projected at \$2.067 billion. (19 RP 4759). For Casas del Rio, it projected at \$2.090 billion. (21 RP 5375).

2. Petitioners description of housing needs.

Petitioners have selectively described elements of the transaction documents that do not complete a complete picture. First, Petitioners describe a shortage of residential facilities in 2007 and state that the existing facilities were rated in student surveys as among the worst in the nation. (BIC at 3). This is misleading. The surveys were from the Princeton Review, not from UNM students. UNM commissioned a study from Brailsford & Dunlavey. That study showed overwhelming satisfaction of the UNM students with the existing UNM facilities, with an overall rating of “satisfactory” or “very satisfactory” of 88%. (20 RP 5146). The survey also showed responses as to the five features that would be most important in new housing. Those five features were all residential factors: kitchen, private bathroom, single bedroom, in-room/wireless internet access, and air conditioning. (20 RP 5149). These factors are consistent with the facilities that were later constructed: Lobo Village is exclusively apartments with private bedrooms and bathrooms for each resident and

kitchens and living areas within the apartments. Casas Del Rio is suite-style generally offering two bedroom suites, single or double occupancy, with one private bath.

3. UNM-ACC Agreements.

As noted in the Brief in Chief, UNM entered into a public-private partnership agreement with ACC to build the facilities. The characterization of the development as being controlled by UNM and a focus on ACC's provision of academically-oriented residences is not entirely accurate. UNM initially issued a Request for Information/Qualifications ("RFI") from interested parties. That RFI identified the objective as construction of a multi-phase project that would add approximately 1,900 beds to supplement the existing housing. (20 RP 5242). The developer's responsibilities were listed as: financing, design of facilities and infrastructure, construction, and asset management of the properties. (20 RP 5242).

UNM then issued a Request for Proposals that largely mirrored the RFI but that also specified the evaluation factors: Project Vision—45%; Project Financials-40%; Management Plan—15%. (18 RP 4486-87). The Vision component was concerned with the provision of 1,900 new beds at a level of quality acceptable to Lobo Development (UNM's development arm) and with all of the design and construction components to be determined by mutual agreement between the developer and Lobo. The only mention of the Residential Life programs that

Petitioners now emphasize was a statement that they could be managed by either the developer or the university. (18 RP 4486-87).

The parties entered into a Master Agreement for Lease of UNM Sites for Student Housing. The purpose was to design, develop, manage, and operate large scale and complex student housing projects. The project was determined to be in the best interest of the University and its students because: (1) ACC Affiliates will make available additional quality student housing for University students, and (2) ACC Affiliates will be solely responsible for financing and debt repayment of the Program that the University or Lobo would otherwise be required to undertake to ensure adequate student housing for its students. (18 RP 4501). The entire emphasis was thus on housing, not academics, and on ACC's sole financial responsibility.

The Master Agreement was followed by a Strategic Housing Plan and Preliminary Materials for both projects that were prepared by ACC. The Preliminary Materials expressed the parties' belief that they would be exempt from property taxes, with a reduction in rent to UNM based on 10% of the taxes owed in the event that they were assessed. (18 RP 4638, Lobo Village Preliminary Materials). The two Ground Leases followed, with comprehensive provisions consistent with large-scale development projects. Consistent with the other documents, the leases emphasized ACC's sole responsibility for design, financing and construction. (19 RP 4653, Lobo Village). While the plans called for approval by UNM, those plans were

prepared by ACC and included every aspect of design and construction. (19 RP 4664, § 4.1, Lobo Village). The leases provided for ACC's access to student information for accepted and enrolled students. (19 RP 4671-72, §§ 7.2-7.3, Lobo Village). The permitted uses were identified as:

Lessee shall use the Leased Premises only for UNM Student residential housing, parking and ancillary supporting uses, such as (without limitation) a management office, a leasing office, common areas and amenities, recreational rooms, meeting rooms, workout rooms, utility rooms, lobbies, and parking areas, swimming pools and other outdoor amenities.

(19 RP 4677, § 8.1, Lobo Village). The emphasis was entirely on residential uses, and it supports the Board's findings of use of the properties as being primarily residential. The leases also carried forward the taxation concerns expressed in the earlier documents.

4. Evidence of Residential Uses.

As noted above, Petitioners included academic uses in their Summary of Facts. But they did not adequately present the facts that support the Board's decision. The evidence as to primary residential use was presented by the affidavits of the Assessor's representatives. Juanita Chavez is the Valuation Relief Manager for the Assessor's office. She conducted inspections of both properties and presented her findings in her affidavit. (32 RP 8214-8219). The Board quoted from her findings. (32 RP 8360, ¶¶ 25-28). It would unduly lengthen this brief to recite all of those

findings here, and the Assessor respectfully refers the court to Ms. Chavez's findings and those of the Board. The Assessor will, however, summarize those findings.

Regarding Casas del Rio, Ms. Chavez visually inspected the premises and compared them to the diagrams contained in the Preliminary Materials, which are found in the record at 32 RP 8222-8248, 8281-8292. She described four buildings, each four stories high. Her description is as to building A, noting that the other three buildings have similar floor plans. (32 RP 8215, ¶ 8). Building A has 75 or 76 residential suites which consist of single or double occupancy bedrooms with a common bathroom for each of two bedrooms. (*Id.*, ¶ 9). The building has approximately 280 beds. Since the buildings are not all the same size, there is a total of 864 beds in the complex, but the basic layouts of the buildings are the same. (*Id.*, ¶ 10).

Each building has 2 study rooms on each of 2 floors, for a total of 4 study rooms per building, each of which accommodates 8 students for a total capacity of 32 students per building, serving the building's population of 280 students. The other two floors in each building have kitchens and laundry rooms in place of the study rooms. (32 RP 8215-8216, ¶ 11). She found that there are no instructional materials in any of the study rooms and they appear to be too small to serve as instructional classrooms. She stated her understanding that no academic classes are conducted in the study rooms. (32 RP 8216, ¶ 12).

Building C contains a conference room with a capacity of 50 people but otherwise follows the Building A model. (*Id.*, at ¶ 13). Building B also has 1 computer room with 8 individual computers. (*Id.*, ¶ 15). Building B also contains several office used by the ACC staff, a fitness room with gymnastic and fitness equipment, a game room, and a testing room that is used by UNM. (*Id.*). She concluded that all of the buildings are used primarily and substantially for residential purposes and not educational purposes. (*Id.*, ¶¶ 14 & 16).

Regarding Lobo Village, Ms. Chavez found it to be an apartment complex with 20 buildings. (32 RP 8217, ¶ 20). Eighteen of the buildings are identical three-story apartment houses, each containing 12 apartments. (*Id.*, ¶ 23). Each apartment has 4 private bedrooms and 4 full, private baths, a living area, a full kitchen and a washer and dryer. (32 RP 8218, ¶ 23). The residential capacity is 60 residents per building.¹ There are no common areas, study rooms, classrooms or other types of lounge areas in any of the 18 apartment buildings. (*Id.*, ¶ 26). She expressed the opinion that the 18 apartment buildings are used primarily and substantially, and apparently exclusively, for residential purposes and not educational purposes. (*Id.*, ¶ 28).

¹ Ms. Chavez identified the total capacity of the complex as 864, but that would be a reference to Casas del Rio. At 60 residents per building for 18 buildings, the capacity would be 1080. Ms. Farmer confirmed a capacity of 1,025. (17 RP 4271, at 432: 4-10).

Regarding the clubhouse at Lobo Village, Ms. Chavez identified it as a modern split-level building containing 17,488 square feet. It has the following rooms and uses: administrative offices, a large conference room, one computer room with 5 computers; two small study rooms with a capacity of 8 persons each; common seating/lounge areas; a theater with 60 seats; a game room with typical games such as ping pong, pool and air hockey; and a large fitness center. (*Id.*, ¶ 29). The area outside the clubhouse contains a large recreational area that includes a swimming pool, hot tub, volleyball court, and a cabana for outdoor cooking. (32 RP 8219, ¶ 30). She found the clubhouse and outdoor recreational facilities to be typical of luxury apartments and that they are used primarily and substantially for residential purposes and not educational purposes. (*Id.*, ¶ 31). Ms. Chavez's overall conclusion regarding Lobo Village was:

Overall, Lobo Village is considered to be a luxury apartment complex, which is defined as a type of apartment that is intended to provide its residents with higher than average levels of comfort, quality and convenience. Those levels of comfort, quality and convenience at Lobo Village include private bedrooms that each has its own personal full bathroom, full modern kitchen and living areas, and the property itself includes a full-size gym, movie theater, game room, swimming pool, hot tub and the other amenities described above. Those are typical amenities that you would find in an upscale apartment complex.

(*Id.*, ¶ 34).

Ms. Chavez’s testimony as to the physical layouts and uses of the two facilities was largely confirmed by Melinda Farmer, ACC’s Regional Manager. (17 RP 4270-4272, at 427-33).

Clyde Ward, the Deputy County Assessor, provided an affidavit in which he reviewed the uses of the facilities and analyzed them pursuant to relevant caselaw. It was his responsibility to review the application for educational exemption and the materials related thereto. He determined that the overwhelming majority of the premises at Casas del Rio is residential in the nature of upscale residences. He found that the apartments at Lobo Village were used primarily, substantially and exclusively as residences, with no educational use at all. The clubhouse is used primarily and substantially for the recreational and social activities of the residents. (32 RP 8327, ¶¶ 13-14). He found that the student programs offered and conducted by residential advisors are subordinate in terms of time, frequency and attendance. (*Id.*, ¶ 15). He also found that the educational and developmental benefits described by ACC are in the nature of remote and consequential benefits derived from the use of the property as a residence and not the direct and immediate use of the property as explained by the Court of Appeals in *NRA*. (32 RP 8327, ¶ 16).

5. South Campus TIDD.

Deputy County Assessor Ward included information in his affidavit regarding a Tax Increment for Development District (“TIDD”) located on the South Campus.

The documentary materials for that district are included in the Record Proper at 32 RP 8334-8343.

A TIDD is authorized pursuant to the Tax Increment for Development Act, NMSA (1978), §§ 5-15-1 *et seq.* The purpose of the Act “is to create a mechanism for providing gross receipts tax financing and property tax financing for public infrastructure for the purpose of supporting economic development and job creation.” *Id.* § 5-15-3. UNM proposed the TIDD for the South Campus as a “Joint City of Albuquerque & University of New Mexico Tax Increment Development District, UNM South Campus.”

Briefly, the district is located entirely within the South Campus. (32 RP 8329, ¶ 24). Mr. Ward described the elements of the district and stated that, according to the Lobo Development Corporation Executive Director, “the University envisions bars, shopping, restaurants, hotels, movie theaters, and a beefed-up business park. The proposal anticipates 4,000 new jobs and \$4.2 billion in salaries over the 25-year period of the district. The director further represented that the facilities, although located on UNM land, would be subject to property and gross receipts taxes.” (32 RP 8329, ¶ 23).

Mr. Ward concluded by identifying the TIDD project as an economic development project, not an educational project. “The proposal clearly shows the intentions and objectives of UNM outside of its traditional educational mission. It is

consistent with the primary purpose of Lobo Village as a profit-generating enterprise by ACC and the primary use of the buildings as residential facilities that house a population necessary to the proposed commercial market.” (32 RP 8329, ¶ 24).

ARGUMENT AND AUTHORITIES

I. Whether the Court of Appeals erred by not following the reasoning of *Alumnae Association* and instead concluding that the student residential facilities at issue are not used for educational purposes within the meaning of the constitutional tax exemption?

This Court granted certiorari on the question as presented in the Petition for Writ of Certiorari, which is the question quoted immediately above. That question, however, is somewhat misleading. The administrative standard of review, quite simply, is whether the protest board’s decision and order is supported by substantial evidence. The district court and the court of appeals both applied this standard. *See Gallup Westside Dev., LLC v. City of Gallup*, 2004-NMCA-010, ¶ 10, (court of appeals conducts same review of administrative order as district court sitting in its appellate capacity).

Petitioners’ phrasing of the question does not consider this standard at all. Instead, Petitioners’ argue that the court of appeals itself erred in finding that the direct, immediate, primary, and substantial use of the properties is residential and that any educational function is incidental and secondary to the residential use. (COA Opinion at 8-9). The court’s opinion was based on its review of the whole

record. (COA Opinion at 8). Petitioners' phrasing of the issue as stated above invites this Court to abandon the administrative standard of review altogether. Their real issue is whether the educational standard itself should be replaced with a standard that completely avoids any factual review.

In their Brief in Chief, Petitioners do not restate the issue as stated in their petition. Instead, they characterize the issue such that it assumes their own factual predicate and then necessarily leads to their desired conclusion. It is, essentially, bootstrapping. The issue is stated in the Brief in Chief as:

The University's Dedication of Its Property Specifically to Student Housing, in Support of the University's Educational Mission and Subject to Its Direction and Control Through the Mechanism of Its Public-Private Partnership with ACC, Establishes an Educational Use Under *Alumnae Association*.

(BIC at ii). The entirety of that sentence conflicts with the entirety of governing law, which includes both the standard of review and the standards for determining educational exemptions. Acceptance of Petitioners' premise will require a significant divergence from, if not outright overruling of, those standards.

A. Standard of Review.

The court of appeals succinctly laid out the standard of review of administrative decisions in *Gallup Westside Dev., LLC v. City of Gallup*, 2004-NMCA-010, ¶ 10, 135 N.M. 30:

This case involves a question of substantial evidence. Consequently, we review the district court's ruling by independently examining the

entire record, keeping in mind that a reviewing court may not substitute its judgment for that of the City. We review the evidence in the light most favorable to the City while also considering contravening evidence. We may, if we were fact-finders in this case, come to a different conclusion than the City; but we may only evaluate whether the record supports the result reached, not whether a different result could have been reached. Substantial evidence supporting administrative agency action is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.

Id. ¶ 11 (internal citations omitted). Both the court of appeals and the district court correctly applied this standard. (COA Opinion at 4; District Court Memorandum Opinion at 4).

Petitioners specifically reject this standard, stating: “Because the lower courts mistakenly applied the *NRA* criteria to determine educational use, the substantial evidence approach taken by the district court, which focused on the fact that students resided in the Facilities, was misdirected.” (BIC at 27-28). Moreover, the evidence presented by Petitioners in their summary of facts is geared entirely toward their view of the university’s educational mission and completely ignores the evidence that the Board relied upon to show a primary residential use. In its second hearing, the Board agreed that the parties could supplement the record from the first hearing by submitting affidavits of educational use. Petitioners submitted the affidavit of their expert witness, Dr. Heasley, while the Assessor submitted affidavits from Juanita Chavez, an appraiser who actually inspected the properties, and from Clyde Ward, the deputy assessor. None of this is included in Petitioners’ factual summary,

and they dismiss the court of appeals’ review of that evidence by stating: “Similarly, the Court of Appeals’ nitpicking critique of Dr. Heasley’s affidavit testimony had no bearing on the factors actually pertinent to educational use in this case.” (BIC at 28). Petitioners thus reject the administrative standard of review and the court of appeals’ application of it in every way. The court’s discussion of Dr. Heasley’s affidavit is, in fact, germane to its decision in actually following the *Alumnae Association* holding, as discussed below.

B. Standard for Educational Exemption.

The state constitution provides that all property used for educational or charitable purposes shall be exempt. N.M. Const. Art. VIII, § 3. The method of determining that use has been left to the courts. In *Temple Lodge No. 6*, this Court observed that “[t]he broad expression ‘used for educational or charitable purposes’ necessarily imposes upon the courts a severe task of interpretation.” *Id.* ¶ 39. The determination is fact-specific, as noted by this Court in *Benevolent and Protective Order of Elks, Lodge No. 461 v. New Mexico Property Appraisal Department*, 1972-NMSC-006, 83 N.M. 445:

Clearly the sole question to be determined is whether the property is “used” for charitable purposes. This determination must necessarily depend on the uses being made of each property of which it is claimed comes within the exemption. *Except to the extent that the facts as to use are so nearly alike as to logically compel like results, no case can be said to constitute a controlling precedent for another case in this area.*

Id. ¶ 3 (emphasis added, internal citations omitted). As discussed in more detail below, the court of appeals in this case found it to be virtually indistinguishable from *Alumnae Association*.

The test for determining educational use was laid out in *NRA*. The court of appeals held:

In summary, we hold the phrase “used for educational purposes” to mean “the direct, immediate, primary and substantial use of property that embraces systematic instruction in any and all branches of learning from which a substantial public benefit is derived.”

Id. ¶ 35. It is the use of the property, not the ownership, that is determinative, and “the declared objects and purposes of the owner are not determinative.” *Georgia O’Keeffe Museum*, ¶ 40.

This Court further examined *NRA* in *CAVU Co. v. Martinez*, 2014-NMSC-029. The Court observed that *NRA* has three parts to the test: “(1) use that is direct, immediate, primary, and substantial, (2) use that embraces systematic instruction in any and all branches of learning, and (3) use that imparts a substantial public benefit.” *Id.* ¶ 13. The Court also stated that “whether the property is in use is completely dependent upon what the proposed use is.” *Id.* ¶ 19. In the current case, the transaction documents clearly state that the proposed use is residential housing. *CAVU* also added a summary to the test:

Instead of adding a new fact-specific exception to the rule, we distill the various rules and exceptions governing exemptions to one overarching principle: “[T]he proper focus of any inquiry into the

propriety of an exemption is whether the use of the property furthers exempt purposes.”

Id. ¶ 21. The focus is exactly that, a lens through which the use is examined. This Court did not abrogate the NRA test, but rather retained it as the established rule. The Court went on to a detailed examination of the evidence to determine if it satisfied the test. *Id.* ¶¶ 23-26 (direct, immediate, primary and substantial use); ¶¶ 27-29 (embraces systematic instruction); ¶¶ 30-31 (substantial public benefit).

The lower tribunals in this case followed *NRA*. Petitioners argue against the *NRA* standard. (BIC at 27-28). Neither *CAVU* nor any other case supports that argument.

C. Use, not ownership, is the test.

It is undisputed that all of the facilities at issue in this case are residential buildings used for residential purposes. Both ACC and UNM freely acknowledge that. However, in order to establish an educational use, Petitioners have created a fiction based solely on the intentions and purposes of UNM. A standard such that UNM’s assertion that the buildings’ uses are educational becomes the standard used to establish the educational exemption. While repeating the argument in various ways, the Brief in Chief succinctly summarizes it as follows:

When “those intrusted (sic) with the responsibility for adopting educational policy” on behalf of an educational institution have determined how institutional property should be used to further the institution’s purposes, that decision has been made by those most

informed and qualified to make it, and the use can properly be deemed to be educational in the constitutional sense.

(BIC at 26). The quote incorporates some of the language from the *Alumnae Association* dicta, but otherwise is Petitioners' own creation: the use is educational because we say it is educational. That is not the law. It has not been the law since the constitution was adopted, and this Court rejected a similar characterization early on.

This Court determined long ago that it is the use of property, not the ownership, that determines qualification for an educational exemption. *Temple Lodge No. 6*, ¶ 33 (“While both use and ownership were formerly requisite, use alone now suffices.”) This rule has been consistently applied in an unbroken line of cases. *See, e.g., Mountain View Homes Inc. v. State Tax Commission*, 1967-NMSC-092, ¶ 10, 77 N.M. 649; *United Veteran's Org. v. New Mexico Property Appraisal Dept.*, 1972-NMCA-086, ¶ 4, 84 N.M. 114. The constitutional provision states:

The property of the United States, the state and all counties, towns, cities and school districts and other municipal corporations, public libraries, community ditches and all laterals thereof, all church property not used for commercial purposes, all property used for educational or charitable purposes, all cemeteries not used or held for private or corporate profit and all bonds of the state of New Mexico, and of the counties, municipalities and districts thereof shall be exempt from taxation.

N.M. Const., Art. VIII, § 3. The provision identifies “property of” various governmental entities, and property “used for educational or charitable purposes.”

This Court examined these distinctions in detail in *Temple Lodge* and compared the constitutional provision with the earlier statutory provision in the territorial laws. In relevant part, the territorial statute had provided an exemption as follows:

All public libraries, the grounds, buildings, books, papers and apparatus of literary, scientific, benevolent, agricultural and religious institutions and societies, when the property of the said institutions and societies shall be devoted exclusively to the appropriate objects of such institutions and not leased or rented or otherwise used with a view to pecuniary profit; . . .

Temple Lodge, ¶ 31. It is at once clear that this definition embraced ownership—“grounds, buildings . . . of [the] institutions.” It also had qualifying language: “devoted exclusively to the appropriate objects of such institutions . . .” The adoption of the constitutional language eliminated the qualifying language of the statute, this Court finding that “the elimination must have been deliberate and studious.” *Id.* ¶ 32. The Court rejected the attempt by the taxpayer, a fraternal lodge, to apply the eliminated language as though it were still there.

ACC now attempts to do exactly the same thing as the fraternal lodge in *Temple Lodge* attempted and which this Court rejected, that is, add an element of UNM devoting the property to its declared purposes. That attempt is exactly contrary to this Court’s opinion in *Temple Lodge* and it attempts to add the very language that this Court rejected.

ACC’s proposed standard completely ignores the actual use of the property and instead would allow an institution itself to define educational use as it sees fit.

The *Temple Lodge* opinion recognized the danger in this, stating that the rights granted in the constitutional exemption “are not to be so enlarged as to create rights which the Constitution makers did not contemplate.” *Id.* ¶ 29. The court of appeals likewise has noted the risk of such ill-defined standards in *Georgia O’Keeffe Museum*. In applying the *NRA* standard for an educational exemption, the court stated:

Too broad a standard means no standard. Without a relatively narrow standard governing the educational purposes exemption, subjective ad hoc decision-making can become the rule, making an objective principled process the exception. It is apparent that the *NRA* court sought to narrow the meaning of the constitutional language and to provide guidance to assessors and valuation protest boards. To indiscriminately broaden *NRA* as expansively as O’Keeffe suggests will, in our view, open a door for standardless property tax exemption determinations.

Id. ¶ 45.

ACC states: “Whether an educational institution’s use of its own property exempts the property from taxation should depend upon decisions made by the individuals best suited to determine how the property can most effectively be put to the service of institutional needs.” (BIC at 32). It is hard to imagine a more wide-open, standardless rule than this, which would allow property owners to set their own standards and would require assessors, protest boards and district courts to blindly accept those determinations. It becomes even more attenuated when we remember that UNM is not the taxpayer; ACC is the taxpayer. The *NRA* court noted

that “[t]he scope of tax exemption has broadened so that exempt organizations tend to grow wealthier and often increase the percentage of exempt property within the state first granting the exemption.” *NRA* ¶ 39. ACC is not an exempt organization, but their attempt to ride UNM’s coattails would have the effect of dramatically increasing their wealth at taxpayer expense. The evidence showed their projected gross revenues over the life of the leases to be over \$4 billion. In pre-hearing discovery, the Assessor requested a list of ACC’s properties nationwide that are exempt from property taxation. ACC refused to provide the list. The Assessor followed up under the rules and was still refused. (ROA 134, Tr. 277/L. 21). At the hearing, the Assessor requested sanctions for ACC’s violation of the discovery rules. (ROA 134, Tr. 277-280). The Board took the motion under the advisement and later, in its Decision and Order, simply denied all motions that had not specifically been addressed, including this one.

For clarity, it must be emphasized that this case does not involve the constitutional exemption for property owned by the government, i.e., UNM. If that were the case, the educational exemption would be redundant. ACC has a separately identifiable leasehold interest under the fractional interest statute. Per the terms of that statute, the leasehold interest of a nonexempt entity in the improvements located on the real property of an exempt entity are taxable to the nonexempt entity. *NMSA* (1978), § 7-36-4. ACC is the nonexempt entity and it must establish an educational

use of the improvements in order to qualify for an educational exemption, an exemption entirely different from a governmental exemption. ACC's premise in this case is to conflate the two exemptions.

No case has allowed an its own uses in order to obtain an exemption. Indeed, the declared objects and purposes of the owner are not determinative. *Georgia O'Keeffe*, 2003-NMCA-003, ¶ 40; *Benevolent and Protective Order of Elks, Lodge No. 461 v. New Mexico Property Appraisal Dept.*, 1971-NMCA-124, ¶ 13, 83 N.M. 505 (use of property determinative, not declared objects and purposes of owner). Adoption of ACC's proposed standard would effectively overrule all of these cases, and it should be rejected.

D. The Court of Appeals correctly applied *Alumnae Association*.

Petitioner's entire argument in this case is based on dicta from *Albuquerque Alumnae*, 1933-NMSC-11, . That case involved a claimed educational exemption for a sorority house located at UNM but owned by the sorority's parent organization. This Court identified the uses of the facility as follows:

The property is used as a fraternal home where the active members of the society board, room, study, hold social functions, and practice the principles of the society while in attendance at the University. The active members encourage scholarship, participate as a group and as individuals in University activities, discuss University and student problems, and require of all members a regular, orderly, and moral life. The local chapter is under the active supervision of the national organization, which requires the maintenance of certain standards, and is also under the direct supervision and control of the University to the same extent that the latter controls other students and organizations. An

existing University regulation requires that all nonresident women students live either in a University dormitory or in one of these chapter houses, and this rule is essential to a proper supervision of women students. The dormitory facilities are not sufficient to accommodate the women students, and would have to be increased except for this and similar sorority houses.

Id. ¶ 2. Every single one of these elements is present in the current case. ACC's residential facilities were built to accommodate UNM's need for student housing; freshmen are required to live either in the university's housing or ACC's; ACC's residents are subject to university rules and oversight; and the students use ACC's residential facilities for room, board, study and social interaction. All of these factors were present in *Alumnae Association*.

This Court considered the *Alumnae Association* factors just as the court of appeals in this case considered the similar factors relied upon by ACC and UNM. Those *Alumnae Association* factors included the objects of the organization "to encourage scholarship, literary and scientific training of the students." *Id.* ¶ 14. They also included the cultural advantages to be gained from the communal living and the high standards to be maintained. *Id.* ¶ 13. The Court also considered that "the intimate relation of the sorority to the University cannot be doubted," but found that the sorority was dependent on the university rather than the other way around. *Id.* ¶ 16. These are the same factors emphasized by Petitioners in this case. But this Court based its holding on the actual use of the property, finding that that use was residential, not educational. *Id.* ¶ 25. Indeed, on rehearing, the Court clarified that

the record “presents no use at all which should be deemed educational within the meaning of the Constitution.” *Id.* ¶ 46 (on rehearing).

The court of appeals in the current case found the facts of the two cases to be “nearly indistinguishable.” (COA Opinion at 7). Regarding the emphasis placed on the educational enrichment for which ACC argues, the court examined the affidavit submitted by ACC’s expert witness, Dr. Heasley, and found it to be “the only evidence presented by ACC to satisfy the second part of the *NRA* test.” (COA Opinion at 10). But as did this Court in *Alumnae Association*, the court of appeals found that the evidence did not satisfy the necessary educational standard, and in fact would run contrary to the warning against standardless determinations earlier expressed in *Georgia O’Keeffe*:

Dr. Heasley’s logic regarding systematic instruction suggested a scenario that defeats the purpose of the tax exemption and opens a door for seemingly ‘standardless property tax exemption determination.’ *See id.* [*Georgia O’Keeffe*] ¶ 45 (‘Too broad a standard means no standard. Without a relatively narrow standard governing the educational purposes exemption, subjective ad hoc decision-making can become the rule, making an objective principled process the exception.’). This Court’s adoption of the very broad standard suggested by Dr. Heasley’s rationale would undermine the efficacy of taxation to our local governments. *See id.* ¶ 39.

(COA Opinion at 11).

Petitioners now dismiss the analysis of the court of appeals as “nitpicking.” They argue for a standard that diverges from the testimony of their own witness, leaving it entirely up to UNM to determine what is educational. “Whether an

educational institution's use of its own property exempts the property from taxation should depend upon decisions made by the individuals best suited to determine how the property can most effectively be put to the service of institutional needs.” (BIC at 32). This premise opens the door to the standardless fears expressed by the court of appeals here and in *Georgia O’Keeffe*. It conflicts with the long-standing principle that it is actual use of the property, not the purposes and intent of the owner, that is determinative. And it completely obliterates the responsibility of the county assessor to determine in the first place whether the property is used for educational purposes as well as the responsibility of the protest board and the district court for reviewing that determination. (See COA Opinion at 14 (property presumed to be subject to taxation; taxpayer has burden to claim, apply for and prove exemption).

E. Petitioners’ reliance on the Alumnae Association dicta is misplaced.

As shown above, the holding in Alumnae Association was that the use of the sorority house, almost identical to the uses at issue here, was entirely residential and not educational at all. The protest board, the district court and the court of appeals all followed that holding in this case.

Petitioners disregard that holding and rely instead on dicta in the case. That dicta distinguished between use and ownership and the hypothetical of whether the university or the private entity provided the residences. The Court stated:

Yet there is this difference: The very fact that an educational institution has devoted property to a use reasonably related to its general purposes,

stamps that use as educational in the opinion of those intrusted (sic) with the responsibility for adopting educational policy. Every use of property by the institution bears a relation to every other use. The whole of its activities is necessarily its educational plan. This is limited by its resources. Each activity is reflected in its budget and in the cost of its educational program. We might readily assume, and it might be presumptuous to deny, that property in use by an educational institution is used for educational purpose.

Alumnae Association, ¶ 18. The Assessor submits that reliance on this dicta is unsound.

First, and perhaps most obvious, is that it deals with a hypothetical situation without regard to actual facts; indeed, it assumes facts as to the university's educational plan. Yet Petitioner's accept the university's statements as foreclosing any inquiry into actual use. Second, the hypothetical assumes that UNM would be providing the residence halls. But in the present case, UNM only provided the land. ACC was 100% responsible for designing, financing, constructing and operating the facilities. All of the risk and all of the benefit falls on ACC, not UNM. That alone distinguishes the Alumnae Association hypothetical.

Third, the dicta referred to was in the context of distinguishing between the private residence hall of the sorority and the dormitories of the school itself. The court cited to early caselaw suggesting that the dormitories, dining halls, study halls and recreation halls of the school itself are educational as much so as the classrooms, lecture halls and laboratories. *Id.* ¶ 17.

The early cases cited by the court are exemplified by *Yale University v. Town of New Haven*, 42 A. 87 (Conn. 1899) and *City of Chicago v. University of Chicago*, 81 N.E. 1138 (Ill. 1907). The *Yale* case traced the 800-year history of the development of colleges and universities in England, on the continent, and in the colonies. The court distinguished between colleges and universities in that a college, historically, was a residential component of a university. While originally little more than lodging rooms and refectory, the college grew “to be the home of the students for all purposes. The instruction and discipline of the university were through the college.” *Id.* at 88-89. The students lived in colleges and were instructed and governed through the colleges. *Id.* at 89. The history is lengthy; suffice it to say that the early concept was such that a college, as a residence and a place of instruction, was an inseparable part of the university, which was the degree-granting institution.

The context of *Yale* was an exemption statute, which provided that “buildings or portions of buildings exclusively occupied as colleges, academies, churches or public school houses, or infirmaries shall be exempt from taxation.” *Alumnae Association*, at 88. It was in that context that the court had to determine what a college was since it would be exempt if occupied by the college. In that context, the provision was similar to the current New Mexico provision relating to “property of the government” or “church property.” Both of those terms, as discussed above, suggest ownership. They are distinct from the concept of use.

The *Albuquerque Alumnae* dicta also cited *City of Chicago v. University of Chicago*, 81 N.E. 1138, 228 Ill. 605 (Ill. 1907). That case did not involve property tax at all, but rather involved water taxes and rates assessed against property “of any charitable, religious or educational institution within the city of Chicago as is used in the immediate conduct and carrying on of the charitable, religious or educational purposes of such institution . . .” *Id.* at 605. The ordinance involved both ownership and use, distinguishing it from our constitutional provisions. As concerned the historical context, the Illinois court cited to *Yale*, observing that “for hundreds of years the dormitories and the dining halls have been an essential part of universities and colleges.” *Id.* at 608. That development, detailed in *Yale*, was in a very different context from today’s institutions.

The dicta in *Albuquerque Alumnae* was a generalization based on historical development, not on a given set of facts. Its application in a case such as the one at bar would be questionable. While the Board and the district court found that both Lobo Village and Casas del Rio were primarily residential and not educational, the evidence as shown in the affidavits and the testimony showed different actual uses, structures, and objectives for different categories of students. One size does not fit all, and the facts of each property must be considered.

Petitioners’ position is also internally inconsistent with UNM’s existing practices. The evidence showed that the improvements of one or more Greek-letter

houses located on campus are in fact assessed and taxed to the fraternal organizations. It also shows faculty residences that are similarly taxed. There was no showing that these practices have adversely impacted the university. Yet UNM now claims that an exemption for ACC is essential to UNM's mission. The dichotomy again suggests that the maintenance of the traditional standards for an educational exemption must be adhered to in order to avoid ad hoc decision-making at the whim of the university.

Petitioner's reliance on this dicta runs counter to all of the authorities discussed herein. It makes assumptions that remove a factual showing as to use completely from the analysis. It elevates the owner's intentions above actual use. It abrogates *NRA* and its progeny entirely. And it abandons the substantial evidence standard of review. It cannot reasonably be stated that this Court, in its review of a similar situation in 1933, intended to lay down a rule for a situation that was not before the Court at that time and that would apply almost a hundred years later without regard to any underlying facts and that would, if applied, abrogate all of the existing authority.

E. Unintended consequences.

Petitioners' requested rule is global, that is, the *Alumnae Association* dicta necessarily imbues all university property as educational. Whatever the situation was in 1933, it certainly is not the situation today.

The authority underlying the assessment and taxation of ACC's leasehold interest is found in the fractional interest statute of the Property Tax Code. That statute provides that the improvements on land of an exempt entity that are owned or leased by a nonexempt entity are subject to valuation and taxation of the nonexempt entity. NMSA (1978), § 7-36-4. That is the situation here with ACC. The statute has not been challenged and is not at issue here. However, the practical effect of holding that all property of UNM necessarily embraces an educational use is that ACC's fractional interest becomes meaningless.

Such a holding would also potentially work against UNM's master plan. The evidence showed that all of UNM's vacant land on the South Campus is included in a TIDD pursuant to the Tax Increment for Development Act, NMSA (1978), §§ 5-15-1 *et seq.* The entire purpose of the Act is "to create a mechanism for providing gross receipts tax financing and property tax financing for public infrastructure for the purpose of supporting economic development and job creation." *Id.* § 5-15-2(A). The rule argued for by Petitioners would appear to undermine the viability of the district that is itself UNM's own creation.

The collateral consequences are not hypothetical. In the Brailsford & Dunlavey study relied upon by Petitioners, the authors recommended increasing the student housing to meet demands by developing a mixed-use residential facility with

commercial components to be located on the Main Campus at the intersection of Central Avenue and Girard Boulevard, stating:

The development of this complex with multi-use retail at the ground level would activate the intersection and act as a connector to the lively Nob Hill shops and retail located along Central Avenue. The development of this land with a high level of activity and well lit space is essential to spurring development and addressing the concern that this area is unsafe.

(20 RP 5107). The suggestion is based on the need for more student housing, the same as in this case. The concept is based on a mix of residential and commercial purposes. But if UNM is the one deciding what its needs and financial resources are, the development would seemingly fit into Petitioner's proposed rule despite clear nonacademic and non-university objectives. The same standardless approach would apply, while application of the traditional *NRA* standards would allow a fact-based determination.

II. The Assessor should not be equitably estopped, as a matter of “right and justice,” from denying an educational use exemption for certain years on the ground that ACC did not apply for an exemption.

ACC argues that the Assessor should be equitably estopped from denying an educational exemption for tax years 2012-2021 on the ground that ACC never applied for the exemption. There are multiple problems with the argument.

First, neither the facts nor the law supports the argument, and certainly not to the degree of “right and justice.” ACC argues that the Board found that ACC “could reasonably have relied” on the Assessor's representations regarding ACC's tax-

exempt status and that by failing to cross-appeal, the Assessor is bound by that finding. (BIC at 33). The Board's Decision and Order is not that simple.

What the Board actually found was that the submission of a claim of exemption is mandatory under the Property Tax Code, that ACC failed to apply for tax years 2012-2021, and that the Board therefore could not grant an exemption. (RP 011, D&O ¶ 4.2.32-4.2.33). The Board then discussed the evidence regarding the Assessor's representations and ACC's reliance on them and in that context stated that ACC could have relied upon them. (RP 013, D&O ¶ 4.2.39). But that is not a "finding" of the Board. The Board specifically, and correctly, disavowed any authority to rule on equitable estoppel. (RP 013, D&O § 4.2.40; RP 014, D&O ¶ 4.2.44). *See AA Oilfield Serv. v. New Mexico SCC*, 1994-NMSC-085, 118 N.M. 273 (administrative agency lacks authority to grant equitable remedies). Accordingly, the Board determined that it must "follow the law as written, including the law requiring that an application be made and denied before we have the power to act on its subject matter." (RP 015, D&O ¶ 4.2.45). The Board thus never made a determination as to equitable estoppel and, accordingly, there was nothing for the Assessor to cross-appeal.

Second, the facts show that ACC, the taxpayer, never inquired about exemptions and the Assessor's staff never made representations to ACC. The evidence relied on by ACC shows two e-mails in June, 2010. The first e-mail was

on June 4, 2010, from Julie Brasil, an employee of UNM's real estate office, to Kim Murphy, the director of UNM's real estate office. Ms. Brasil said simply that Anthony Garcia from the Assessor's office had called inquiring about the project and that she would pass the message along to Mr. Murphy. (RP 930).

The second e-mail was dated June 9, 2010, from Mr. Murphy to ACC's project manager, Mark Rogers, with a copy to John Salazar, outside counsel who served as UNM's counsel in the negotiations and transactions. The subject matter of that message was: "Re: County Assessor's Office is snooping around." The e-mail read:

Yes. I spoke to a staff person at the assessors office this afternoon with Julie from my office and explained the project as we discussed. He said that as long as the improvements are owned by UNM, he's fine with them being exempt. I told him that is what the agreement states. He asked if we would be getting a "deed" to the improvements. I responded that we had not anticipated that since the agreement makes it clear that UNM owns the improvements, but that if the assessor needed additional documentation, that it could be provided.

He said that he would report on our conversation, and would get back if anything else was needed. Hopefully, this will be the end of it, but I can't be certain. Kim.

(RP 931).

Those two e-mails are all there is. If Mr. Murphy received a response from either Mr. Rogers or Mr. Salazar, it doesn't appear in the record. More important, it is clear that the Assessor's staff did not make any representation to anyone at ACC; the conversation was with UNM. ACC does not explain how it could rely on a representation that was ever made to it.

Moreover, the suggestion that ACC could reasonably rely on that message in a transaction of this magnitude is disingenuous. ACC had substantial experience with on-campus housing and the tax implications of it across the country. As explained above under Issue I, the Assessor requested that information in discovery and ACC refused to provide it. The tone of Mr. Murphy's e-mail, that the Assessor was "snooping around" and that he hoped "that would be the end of it, but I can't be certain," shows little attempt to get clear information or to comply with statutory requirements. In addition, the parties had already considered the tax implications in their negotiations, as explained above in the Summary of Facts. 1.2.4). Both ground leases show a commitment by UNM to assist ACC in obtaining exemptions. The Lobo Village Ground Lease states in part:

Lessor and Lessee intend and believe that the Land, Improvements, Unit FF&E and Project are and will be exempt from ad valorem or other property taxes or assessments, leasehold taxes, rental sales taxes and other taxes or assessments (collectively, "Taxes"). Lessor and Lessee will cooperate in good faith to ensure that applicable exemptions for Taxes are at all times applicable to the Land, Improvements, Personal Property and Project.

(RP 354, § 6.1). The tax provision further obligates the parties to cooperate and defend against any taxes or assessments to the end of establishing "a complete exemption." (RP 354, § 6.1). The Casas Del Rio Ground Lease contains the same provisions. (RP 783-84, §§ 6.1-6.2).

Setting aside the question of whether UNM's agreement to aggressively assist a private company in avoiding taxes was even a legitimate exercise of its authority, the provisions clearly show a sophisticated knowledge of taxes by both parties. Yet neither party ever followed the code provisions applicable to obtaining an exemption.

New Mexico is a self-reporting state. The property owner is required to report its property to the Assessor. NMSA (1978), § 7-38-8. Exemptions for nongovernmental entities, i.e., ACC, must be claimed to be allowed. *Id.* § 7-38-17(B). The fractional interest statute specifically requires the nonexempt entity, i.e., ACC, to report its interest as well as its claim for exemption to the Assessor. *Id.* § 7-36-4(C). Neither ACC nor UNM ever contacted the Assessor's office to report and claim an exemption. And as shown above under Issue I, UNM, at least, already knew that the leasehold interests of fraternities, sororities and faculty houses on campus were taxable.

ACC's claim of detrimental reliance on a single phone call with an unidentified individual is simply not believable. At a minimum, the details of the conversation, the e-mails, and the complex tax considerations in the leases undermine any argument based on "right and justice."

There are six basic elements of equitable estoppel that must be satisfied to determine whether the doctrine will bar claims of a state agency. *Waters-Haskins v.*

New Mexico Hum. Servs. Dep't, Income Support Div., 2009-NMSC-031, ¶ 22, 146 N.M. 391, 399, 210 P.3d 817, 825. The Supreme Court in *Waters-Haskins* listed the six elements as follows:

(1) the agency's conduct amounting to a false representation or concealment of material facts or, at least, that is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the agency's intention, or at least expectation, that the other party will act upon such conduct; and (3) the agency's knowledge, actual or constructive, of the real facts. The essential elements that apply to the party raising equitable estoppel as a defense are (1) [l]ack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially. To apply the doctrine against a state agency, we must find each of these basic elements.

(internal quotation marks and citation omitted); *Id.*, ¶ 22. Furthermore, the court will only apply equitable estoppel to a state agency when the agency has engaged in a shocking degree of aggravated and overreaching conduct, or when right and justice demand it. (internal quotation marks and citation omitted) *Id.* at ¶23.

As detailed above, ACC meets none of these requirements. There is no suggestion and no evidence that Anthony Garcia made either a false representation or concealed a material fact. There is no evidence that Mr. Garcia intended that ACC would act on the conduct; indeed, the evidence suggested that UNM's and ACC's representatives wanted the matter to quietly go away. And since it was Mr. Murphy who relayed the ownership information to Mr. Garcia, the agency's knowledge as to

the real facts was completely derivative of the representations made to Mr. Garcia by UNM's representative.

In terms of ACC's reliance, the complexity of the transaction documents show an in-depth knowledge, not a lack of knowledge on ACC's part. Since the Assessor never communicated with ACC, there is no showing of reliance by ACC on the information. And since the tax implications were already covered by the parties in the documents prior to the e-mails, there is no showing that ACC changed its position. The complete failure of ACC to ever report the property or claim an exemption shows quite the opposite, that it never intended to try and comply with the statutory requirements.

Even if ACC adequately addressed the elements of estoppel, they have clearly failed to establish that the Assessor displayed "a shocking degree of aggravated and overreaching conduct" or that "right and justice" demand application of the doctrine. *Waters-Haskins* at ¶22. ACC never attempted to determine the tax status from the Assessor's office. It was only UNM that did so, and only because, according to Kim Murphy, the Assessor was "snooping around." The reality of the situation is that ACC and UNM are both sophisticated entities with professional staffs and both inside and outside counsel that knew that the property might be subject to tax, yet never attempted to comply.

PRAYER FOR RELIEF

For the foregoing reasons, Respondent Bernalillo County Assessor respectfully requests that this Court affirm the opinion of the court of appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of June, 2026 I filed the foregoing pleading electronically through the court's Odyssey file and serve system. I FURTHER CERTIFY that a copy of the foregoing was also transmitted via electronic mail to the following:

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