

LA County position (from Ungerleiter email dated 1/24/24):

As you know the main struggle we have faced in making this LEDA transaction work is finding sufficient collateral to secure the proposed \$700,000 use of public funds to support private enterprise as required by the Local Economic Development Act. ("If a local or regional government provides public support for an economic development project without the participation of the state, the local or regional government and the qualifying entity shall enter into a project participation agreement pursuant to this section...The qualifying entity shall provide security to each local or regional government or any other New Mexico governmental entity providing public support for an economic development project. The security shall secure the qualifying entity's obligations based on terms stated in the project participation agreement with the local or regional government and shall reflect the amount of public support provided to the qualifying entity and the substantive contribution expected from the qualifying entity." N.M. Stat. Ann. § 5-10-10) As you know this is a legal duty imposed on the County by the State of New Mexico that we cannot ignore or waive. Thus, we are required to find collateral with an approximate worth of \$700,000 to proceed with this economic development project.

SALA believes the County staff's interpretations of the LEDA collateral requirements are overly narrow and aggressive and do not serve public interests in seeing the project implemented. There is an equally valid interpretation that SALA believes can and should be applied.

Here is the text of the law:

Universal Citation: NM Stat § 5-10-10 (2021)

<https://law.justia.com/codes/new-mexico/2021/chapter-5/article-10/section-5-10-10/>

- A. If a local or regional government provides public support for an economic development project without the participation of the state, the local or regional government and the qualifying entity shall enter into a project participation agreement pursuant to this section.
- B. The local or regional government shall require a substantive contribution from the qualifying entity for each economic development project. Public support provided for an economic development project shall be in exchange for a substantive contribution from the qualifying entity. The contribution shall be of value and may be paid in money, in-kind services, jobs, expanded tax base, property or other thing or service of value for the expansion of the economy.
- C. The qualifying entity shall provide security to each local or regional government or any other New Mexico governmental entity providing public support for an economic development project. The security shall secure the qualifying entity's obligations based on terms stated in the project participation agreement with the local or regional

government and shall reflect the amount of public support provided to the qualifying entity and the substantive contribution expected from the qualifying entity.

D. If a qualifying entity fails to perform its substantive contribution, the local or regional government shall enforce the project participation agreement to recover that portion of the public support for which the qualifying entity failed to provide a substantive contribution. The recovery shall be proportional to the failed performance of the substantive contribution and shall take into account all previous substantive contributions for the economic development project performed by the qualifying entity, based on the terms stated in the project participation agreement.

E. The project participation agreement at a minimum shall set out:

(1) the contributions to be made by each party to the participation agreement;

(2) the security provided to each governmental entity that provides public support for an economic development project by the qualifying entity in the form of a lien, mortgage or other indenture and the pledge of the qualifying business's financial or material participation and cooperation to guarantee the qualifying entity's performance pursuant to the project participation agreement;

(3) a schedule for project development and completion, including measurable goals and time limits for those goals; and

(4) provisions for performance review and actions to be taken upon a determination that project performance is unsatisfactory.

SALA Analysis:

- Section A - The State is not a participant and SALA is prepared to enter into a PPA
- Section B - From the beginning of the project, SALA has proposed a substantial contribution in the form of provision of operation of a unique visitor attraction for at no cost to the community and with no admission charged to visitors, tourists, and others. The amount of the contribution is commensurate to the proposed County contribution to the project. The contribution will be fully accomplished within a fairly short timeframe. SALA proposed collateral in its application that we feel should be sufficient and we have worked to augment this within realistic means. In addition, the project addresses a large number of County priorities and objectives in the areas of economic development, tourism, and downtown vitality. In addition, SALA's application proposed that the equipment to be purchased for the project be collateral.
- Section C - The *obligations* under the proposed PPA are to perform the requirements of the PPA. Performance of the PPA includes utilizing the funding provided to implement the immersive theater capability and other facility enhancements and produce starter

content to exhibit as an attraction in the facility; paying back a portion of the funds provided as a loan through provision of free public exhibition of the starter content; providing additional free public exhibition of the starter content; and meeting reporting requirements of the PPA.

SALA interprets section C to require providing security to the County that SALA will perform these obligations. Section C states, *“The security shall secure the qualifying entity's obligations based on terms stated in the project participation agreement with the local or regional government and shall reflect the amount of public support provided to the qualifying entity and the substantive contribution expected from the qualifying entity.”*

Nowhere in section C is there a specific requirement specifying the value of the collateral that shall be required in any given situation. “Reflect” is an imprecise term that does not necessarily mean “equal”. Section C says that the collateral “shall reflect the amount of public support provided to the qualifying entity and the substantive contribution expected from the qualifying entity.” We argue that it is an overly aggressive interpretation that this means that the County needs to require collateral in the full amount of the support or on the same basis of surety that might be required by a bank making a loan.

We argue that a different interpretation is equally valid if the County wants to see the project accomplished. SALA's interpretation is that the security arrangement should consider the contribution, the risk of the qualifying entity not performing, the substantive contribution from the qualifying entity that will be forgone if the project is not undertaken, and should then reflect these factors. The County Council is fully capable of determining the extent to which proposed collateral “reflects” the amount of public support provided to the qualifying entity and the substantive contribution expected from the qualifying entity

Nowhere in the text of the law is the amount of the security required to be equal to the amount of the support. The law states it as one factor in “reflecting” the amount of the support together with the substantive contribution expected from the qualifying entity.

Nowhere in the text does the law suggest the level of standard that should be applied to acceptance of collateral offered by the qualifying entity. SALA interprets this to suggest that the County has latitude to consider cost/risk/benefit when deciding on the sufficiency of the security. Other public funded economic development lenders use their discretion in determining the sufficiency of collateral and we believe that the County can legitimately choose to do the same given consideration of the benefits and perceived risk.

The use of the term “expected” suggests the introduction of an assessment of the risk involved. SALA asserts that risk of total non-performance of the PPA is low given that the management of the qualifying entity is a long-term, successful entrepreneur in the community and the term of performance is short. The benefits offered by the project will

also serve to mitigate other risks the County faces related to lost opportunity to address community priorities.

Section D - SALA's interpretation of this section is that the primary focus of the County in enforcing performance by the qualifying entity is the PPA. Throughout the discussions with the County, this has been our understanding and that the parties agree that the security agreement would only be relevant and come into play under extremely unlikely circumstances in the short duration of the PPA. SALA can understand that it would warrant greater concern in the case of a much longer termed PPA.

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Here is a link to the County economic development ordinance - [https://library.municode.com/nm/los\\_amos\\_county/codes/code\\_of\\_ordinances?nodeId=PTIICOOR\\_CH2AD\\_ARTVILOECDEPL](https://library.municode.com/nm/los_amos_county/codes/code_of_ordinances?nodeId=PTIICOOR_CH2AD_ARTVILOECDEPL) – It also requires collateral/security to be defined in the participation agreement but does not specify any amount of formula for determining sufficiency.