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NO.
STATE OF NEBRASKA
OFFICIAL
APR 16 1992
DEPT. OF JUSTICE

DATE: April 16, 1992

SUBJECT: Constitutionality of LB 1240

REQUESTED BY: E. Benjamin Nelson, Governor

WRITTEN BY: Don Stenberg, Attorney General
Steve Grasz, Deputy Attorney General

You have requested a review of the constitutionality of LB 1240, Ninety-Second Legislature, Second Session (1992). LB 1240 provides for the designation of enterprise zones and authorizes certain municipalities and counties to establish multiunit housing. Specifically, you have expressed concern regarding section 14 of LB 1240, which defines "facility" for purposes of Neb.Rev.Stat. §§17-961 to 17-966 as including "multiunit housing." You have questioned whether this provision of LB 1240 unconstitutionally allows public funds to be used for private purposes.

Your request implicates both the public purpose doctrine and the Credit of the State provision of Article XIII, §3 of the Constitution of the State of Nebraska.

A. Public Purpose

It is a longstanding principle of constitutional law in Nebraska that public funds cannot be expended for private purposes. Haman v. Marsh, 237 Neb. 699, 722 (1991); State ex rel. Douglas v. Nebraska Mortgage Finance Fund, 204 Neb. 445 (1979); State ex rel. Douglas v. Thone, 204 Neb. 836 (1979); State ex rel. Beck v. City of York, 164 Neb. 223 (1957); Oxnard Beet Sugar Co. v. State, 73 Neb. 66 (1905).

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The Constitution of Nebraska contains no express provision against expending funds for essentially private purposes. This principal "is grounded on the 'fundamental concepts of our constitutional system.'" Douglas v. Thone, 204 Neb. at 842 (quoting Beck v. City of York, 164 Neb. 223). The Nebraska Supreme Court has said this principal "emanates" from Article XIII, §3. Haman v. Marsh, 237 Neb. at 722.

What constitutes a public purpose is primarily for the Legislature to determine.

> It is the province of the Legislature to determine matters of policy and appropriate the public funds. If there is reason for doubt or argument as to whether the purpose for which the appropriation is made is public or a private purpose, and reasonable men might differ in regard to it, it is essentially held that the matter is for the Legislature.

Haman, 237 Neb. at 721 (quoting Thone, 204 Neb. 843). There is no hard and fast rule for determining whether a proposed expenditure of public funds is for a public purpose. Each case must be decided according to the object sought to be accomplished and the degree and manner in which that object affects public welfare. Id.

In determining whether an expenditure serves a public purpose, "the test is in the end result, not in the means." Douglas v. Mortgage Finance Fund, 204 Neb. at 460. "A law may serve the public interest although it benefits certain individuals or classes more than others." Id. Before a court will declare a statute invalid for lack of a public purpose, "the absence of public purpose must be so clear and plausible as to be immediately perceptible to the reasonable mind." Douglas v. Thone, 204 Neb. at 843 (quoting Chase v. County of Douglas, 195 Neb. 838 (1976)).

Since the determination of a public purpose is primarily for the Legislature, it is appropriate to look to the legislative findings or statement of purpose in analyzing a particular bill.

Section 1 of LB 1240 provides in part:

The Legislature finds that:

> (1) There exist in this state distressed areas where unemployment is higher than the state or national average, the average income of the residents is lower than the average family income in the state, the population is declining, property is being abandoned, and other forms of economic distress are occurring which

adversely affect the general welfare of the people of this state;

(2) Such unemployment and other problems cause the distressed areas of the state to deteriorate and become substandard and blighted, making the areas economic or social liabilities which are harmful to the social and economic well-being of the state and the counties and communities in which they exist. Such distressed areas cause a needless increase in public expenditures, impose an onerous burden on the state and its political subdivisions, decrease the tax base, reduce tax revenue, substantially impair or arrest the sound growth of the state and its political subdivisions, depreciate general statewide and community-wide values, and contribute to the spread of disease and crime. This in turn necessitates excessive and disproportionate expenditures of public funds for the preservation of the public health and safety, for crime preventions, correction, prosecution, and punishment, for the treatment of juvenile delinquency, for the maintenance of adequate police, fire, and accident protection, and for other public services and facilities;

. . .

(4) Stimulation of economic development in the distressed areas is a matter of state policy, public interest, and concern and is within the power and authority inherent in and reserved to the state. Economic development is needed to insure that the state will not continue to be endangered by areas which consume an excessive proportion of revenue and that the economic base of the state may be broadened and stabilized by providing jobs and increasing the tax base.

Thus, the expressed legislative intent of LB 1240 is to stimulate economic development.

The Legislature did not specifically state that the provision of multiunit housing constituted a public purpose. However, this is not fatal to the act. In Douglas v. Thone, the act in question contained no declaration of public purpose. The court stated, "We have been cited no authority which holds that any legislative act calling for the expenditure of public funds need contain an express declaration of public purpose. We hold there is no such requirement." Id. at 844-845. The court then examined the legislative history of the act and the stipulated facts to ascertain the legislative purpose of the act. Id. In this case,

we believe previous case law is also relevant. In Douglas v. Nebraska Mortgage Finance Fund, the court stated:

> We have . . . had a previous opportunity to pass upon what constitutes a public purpose and in particular what constitutes a public purpose with regard to housing. In the case of Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N.W. 451, we examined the constitutionality of the act creating the Housing Authority of the City of Omaha. In the course of the opinion we discussed "public purposes," saying: "Plaintiffs contend that the legislation before us was not enacted for a public purpose. In enacting the legislation, the legislature made certain findings to the effect that conditions existed relative to slum clearance and low income housing which required the establishment of sanitary and wholesome housing projects in cities of the metropolitan class with a view of promoting health and sanitation and preventing the spread of crime and disease. The findings of the legislature, while not absolutely controlling, are entitled to great weight. It is obvious that the legislation was passed in the exercise of the police power of the state to protect the health, safety, morals and general welfare of its people. We think that these objectives subserve a public purpose and as such are proper subjects for legislative action. Many states have enacted similar laws and we are impressed with the unanimity with which they have been upheld as being for a public purpose." The fact that the public purpose sought to be eliminated in Lennox v. Housing Authority of City of Omaha, supra, was slum clearance and the public purpose sought to be fulfilled in the instant case is the providing of adequate housing for low and moderate income persons is of no significant difference. It simply reflects the changing times and a society more mindful and concerned with the needs of its citizens.
>
> This was most ably pointed out by the Minnesota Supreme Court in passing upon the constitutionality of their mortgage financing act when they said: "'The notion of what is public use changes from time to time. Public use expands with the new needs created by the advance of civilization and the modern tendency of the people to crowd into large cities. . . .'"
>
> We are persuaded by the reasoning of the Utah Supreme Court in the case of Utah Housing Finance Agency v. Smart, 561 P.2d 1052 (Utah, 1977), wherein they said: "The matter of a serious shortgage [sic] of safe, sanitary, decent housing for a large segment of the

> citizenry falls squarely within the police power of the legislature to deal with the health, safety, and morals of the populace. Courts which have discussed the matter indicate numerous ways in which making decent housing more readily available beneficially affects the health, safety and morals of the public . . . It cannot be said that the finding of the legislature that a public purpose is served by increasing the availability of financing for construction, purchase, and rehabilitation of law and moderate income housing, is incorrect or unreasonable on its face."

Id. at 456-457.

> Our Legislature has found and declared that there exists a serious shortage of adequate housing which can be financed by low and moderate income people. We have no reason to doubt that declaration nor to ignore its public purpose.

Id. at 459.

Therefore, in light of the Legislature's expression of economic development as a legislative purpose for LB 1240, and in light of the holding in Douglas v. Nebraska Mortgage Finance Fund that increasing the availability of financing for housing constituted a public purpose, we conclude provisions in LB 1240 regarding multiunit housing would not be invalidated by a court for lack of a public purpose.[1]

B. Credit of the State

Article XIII, §3 provides: "The credit of the state shall never be given or loaned in aid of any individual, association, or corporation. . . ." Neb.Const. art. XIII, §3.

"[A] public purpose alone will not save a statute otherwise in contravention of Article III, §18." Haman v. Marsh, 237 Neb. at

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[1]We note that LB 1240 as introduced concerned only enterprise zones and the legislative findings were related to economic development. As passed (with select file amendments by Senator Conway), the bill included authorization for multiunit housing without additional legislative findings. Thus, a court would likely consider whether the legislative findings were intended to cover the entire bill as passed. We conclude that due to the general nature of the findings they were intended to cover the additional sections concerning multiunit housing as well.

719. Neither will it save a statute otherwise in contravention of Article III, §3. Id. at 721. "The prohibition against the pledge of the state's credit does not hinge on whether the legislation achieves a `public purpose' when the pledge benefits a private individual, association, or corporation. Id. at 722.

Thus, the conclusion that LB 1240 has a valid public purpose is not dispositive with respect to the credit of the state provision. "The key is whether the state stands as a creditor through the expenditure of public funds or as a debtor by the extension of the state's credit to private corporations, associations or individuals. The state is not empowered to become a surety or guarantor of another's debts." Id. at 723.

The purpose of article XII, §3 is to prevent the state or any of its governmental subdivisions from extending the state's credit to private enterprise. The prohibition contained in Article XIII, §3, applies to the State and all political subdivisions including cities. State ex rel. Beck v. City of York, 164 Neb. 223, 225 (1957). It is designed to prohibit the state from acting as a surety or guarantor of the debt of another. Id. at 718. "It represents the reaction of public opinion to the dissipation of public funds by counties, townships, cities and towns . . . in aid of enterprises apparently devoted to quasi public purposes, but actually engaged in private business." Id. at 719 (quoting State v. Northwestern Mutual Inc. Co., 340 P.2d 200, 201 (Ariz. 1959)).

The Nebraska Supreme Court has held that to establish a bill as unconstitutional under article XIII, §3, three elements must be proved: (1) The credit of the State (2) was given or loaned (3) in aid of any individual, association, or corporation. Id. at 719.

With regard to the first element, "The State's credit is inherently the power to levy taxes and involves the obligation of its general fund." Haman v. Marsh, 237 Neb. at 719. "There is a distinction between the loaning of state funds and the loaning of the State's credit. When a state loans funds it is in the position of creditor, whereas the state is in the position of debtor upon a loan of credit." Id.

The second element concerns whether the state's credit was given or loaned as opposed to the state receiving valuable consideration. The final element concerns the recipient of the credit. As stated above, a public purpose does not necessarily save a statute from scrutiny under article XIII, §3. The key is whether the state stands as a debtor by the extension of the state's credit to private corporations, associations, or individuals. Id. at 722.

Section 14 of LB 1240 defines "facility" as including "multiunit housing." Section 16 of LB 1240 amends Neb.Rev.Stat. §17-963 so as to include "facilities" and provides "The mayor and council of such city . . . shall have the power to borrow money and pledge the property and credit of the city or village upon its municipal bonds, or otherwise. . . ." (Emphasis added). Section 20 of LB 1240 provides certain counties may sell bonds for the construction or acquisition of multiunit housing.

In light of these provisions and the above rules of law, we must conclude LB 1240 does involve the credit of the State for purposes of Article XIII, §3. We further conclude the credit of the State is "given or loaned" under LB 1240. Municipal revenue bonds are obligations of a city even if they are not general obligations and not subject to payment through the exercise of the taxing power. Beck v. City of York, 164 Neb. at 226.

The remaining question, then, is whether LB 1240 gives or loans the credit of the State "in aid of any individual, association, or corporation." Although the housing units in question would undoubtedly be of benefit to individuals, a "law may serve the public interest although it benefits certain individuals or classes more than others." Douglas v. Nebraska Mortgage Finance Fund, 204 Neb. at 460. There is no indication the multiunit housing projects in question will be run as private enterprises or be dominated by private interest. See Beck v. City of York, 164 Neb. at 228-229. Although the state stands as a debtor through the expenditure of public funds, Haman v. Marsh, 237 Neb. at 722, it does not do so with respect "to private corporations, associations or individuals." Id. The State is not a guarantor of another's debts under LB 1240. Id. Thus, LB 1240 does not violate Article XIII, §3.

Respectfully submitted,

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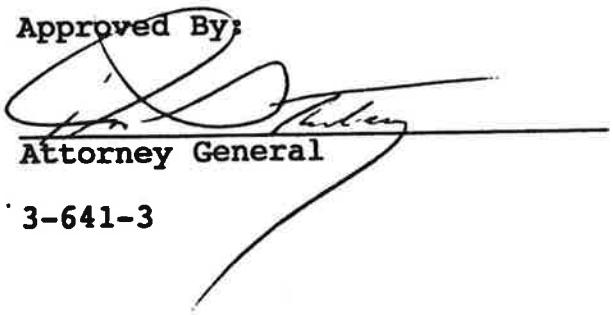
Approved By:



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