STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
1235 K ST. FAX (402) 471-4725

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

93004

STATE OF NEBRASKA
OFFICIAL
FEB 2 1993
DEPT. OF JUSTICE

DATE: February 2, 1993

SUBJECT: Constitutionality of Proposed Change to Nebraska Waste Reduction and Recycling Act

REQUESTED BY: Senator C. N. (Bud) Robinson, Nebraska State Legislature

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

You have inquired whether a change in state statutes which would allow both public and private entities or organizations to receive grants under the Nebraska Waste Reduction and Recycling Act (the "Act"), Neb. Rev. Stat. §§ 81-15,159 to 81-15,165 (1992 Cum.Supp.), would be constitutional under Article XIII, § 3, of the Constitution of the State of Nebraska. Article XIII, § 3, states in relevant part, "[t]he credit of the state shall never be given or loaned in aid of any individual, association, or corporation, . . ."

The Waste Reduction and Recycling Act provides for the creation of a Waste Reduction and Recycling Incentive Fund (the "Fund") to be administered by the Department of Environmental Quality. The Fund consists of revenue from a fee imposed on each new tire sold in the state and on each tire of each new motor vehicle sold in the state and the annual waste reduction and recycling fee imposed on all businesses in the state with retail sales of tangible personal property. Currently, only political subdivisions are eligible for receipt of these funds. The proposed amendment to the Act, as set out in your letter, would open the field of potential applicants to "other entities or organizations, both public and private."

David K. Arterburn
L. Jay Bartel
J. Kirk Brown
David T. Bydalek
Laurie Smith Camp
Elaine A. Chapman
Delores N. Coe-Barbee
Dale A. Comer
James A. Elworth
Lynne R. Fritz
Royce N. Harper
William L. Howland
Marilyn B. Hutchinson
Kimberly A. Klein
Donald A. Kohtz
Joseph P. Loudon
Charles E. Lowe
Lisa D. Martin-Price
Lynn A. Melson
Harold I. Mosher
Fredrick F. Neid
Marie C. Pawol
Kenneth W. Payne
Paul N. Potadle
Jan E. Rempe
James H. Spears
Mark D. Starr
John R. Thompson
Barry Waid
Terri M. Weeks
Alfonza Whitaker
Melanie J. Whittamore-Mantzios
Linda L. Willard

printed on recycled paper

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. ***Haman v. Marsh***, 237 Neb. 699, 719, 467 N.W.2d 836 (1991).

The first determination to be made, then, is whether grants to private entities under the Act would involve the credit of the State. "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." ***Haman v. Marsh***, 237 Neb. at 719-729 (emphasis added). In short, the "credit of the state" provision in article XIII, §3 was "designed to prohibit the state from acting as a surety or guarantor of the debt of another." Id. at 718; id. at 722.

In ***Haman***, the Court found that under the legislation in question "the state would be forever liable for the losses of industrial company depositors. . . ." Id. at 720. "The stated purpose of the act is redemption of the guarantees of a private corporation to depositors by obligating present and future taxes from the state's general fund." Id. In contrast, the grants available pursuant to Neb. Rev. Stat. § 81-15,160(h) (Cum.Supp. 1992) are simply one-time expenditures of state funds. *See* Neb. Rev. Stat. § 81-15,161. The State is not in the position of a debtor nor in the position of a surety or guarantor of the debt of another. Consequently, the credit of the state is not being given or loaned under the Act.

The constitutional analysis does not end here, however. "Closely related to the prohibition against the giving or lending of the state's credit . . . is the principle of law that public funds cannot be expended for private purposes." ***Haman v. Marsh***, 237 Neb. 699 at 721-22. This constitutional principal involves the expenditure of state funds in contrast to the extension of credit. Id. at 722.

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). 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. The Act currently sets out those purposes for which the Fund may be used. The Legislature has expressly limited grants from the Fund to programs and projects which "appear[s] to benefit the general public." Neb. Rev. Stat. § 81-15,161(1). This provision alone, would not likely be dispositive of the issue. However, the Legislature may well conclude the proposed amendment to the Act serves a public purpose. In that event, it is our opinion the

amendments to the Act would be found constitutional. *Compare* Op. Att'y Gen. No. 92061 (April 16, 1992).[1]

Sincerely,

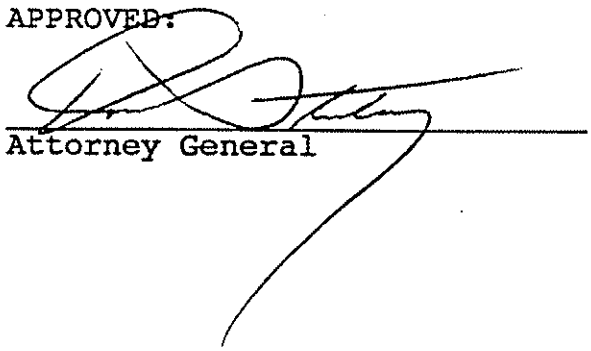
DON STENBERG
Attorney General

Steve Grasz
Deputy Attorney General

28-01-14.93

cc: Patrick J. O'Donnell
Clerk of the Legislature

APPROVED:



Attorney General

---

[1]Op. Att'y Gen. No. 92061 is hereby edited as follows: Page 7, Paragraph 3, Sentence 4 should read, "Although the state stands as a debtor through the extension of its credit . . . it does not do so with respect to private corporations. . . ."