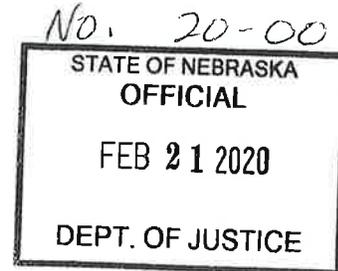




STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 or (402) 471-4725

DOUGLAS J. PETERSON
ATTORNEY GENERAL



SUBJECT: Whether Legislation Authorizing City Airport Authorities To Provide Minimum Revenue Guarantees To Private Airlines Offering To Furnish New And Additional Services Would Violate Neb. Const. Art. XIII, § 3

REQUESTED BY: Senator Mike Hilgers
Nebraska State Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
Lynn A. Melson, Assistant Attorney General

INTRODUCTION

You have requested an opinion from this office concerning a proposed bill that would amend Neb. Rev. Stat. § 3-504.02 (2012) to authorize airport authorities of all classes of cities to "make grants and loans, and offer revenue guarantees, to airlines offering to provide new and additional service to such cities." According to your letter, the services would "be funded through local property tax, which are levied under authorization of § 3-504.02." You add that minimum revenue guarantees "occur when a governmental entity agrees to compensate a private contractor if actual project revenue falls below a specified threshold in order to mitigate the risk taken by the private sector contractor."

You ask whether legislation authorizing an airport authority to offer minimum revenue guarantees to private airlines would violate art. XIII, § 3 of the Nebraska Constitution which, with certain exceptions not applicable here, prohibits extending the credit of the state to any private individual, association or corporation.

ARTICLE XIII, § 3 AND APPLICABLE STATUTES

Neb. Const. art. XIII, § 3 provides: “The credit of the state shall never be given or loaned in aid of any individual, association, or corporation, except that the state may guarantee or make long-term, low-interest loans to Nebraska residents seeking adult or post high school education at any public or private institution in this state. Qualifications for and the repayment of such loans shall be as prescribed by the Legislature.”

Turning to the statutes most relevant to your questions, Neb. Rev. Stat. § 3-502(1) (Cum. Supp. 2018) provides that a city may create an airport authority to be managed and controlled by a board. Subsection (2) then provides that each board “shall be a body corporate and politic, constituting a public corporation and an agency of the city for which such board is established.” *Id.*

Neb. Rev. Stat. § 3-504.02 (2012) provides, in part: “An airport authority may, and in cities of the primary class shall, in addition to the powers enumerated in section 3-504, encourage, foster, and promote the development of commercial and general aviation for the city which it serves, and advance the interests of such city in aeronautics and in commercial air transportation and its scheduling.” You inquire about a proposed bill that would amend § 3-504.02 to authorize all city airport authorities to “make grants and loans, and offer revenue guarantees, to airlines offering to provide new and additional service to such cities.” You are concerned about the constitutionality of a city airport authority offering minimum revenue guarantees to private airlines.

ANALYSIS

I. **Whether A City Airport Authority Is Governed by the Constitutional Prohibition Against Lending the Credit of the State**

The Nebraska Supreme Court has held that the prohibition contained in art. XIII, § 3 applies to the State and all political subdivisions of the State. “Political subdivisions of the State exist at the will of the State exercised through the Legislature. For us to say that the State may not loan its credit to an individual, association, or corporation, but that it might create a political subdivision and authorize it to do that which the State itself is prohibited from doing would be, to say the least, a very anomalous situation.” *State ex rel. Beck v. City of York*, 164 Neb. 223, 224-4, 82 N.W.2d 269, 271 (1957). “Article XIII, § 3 of the Nebraska Constitution prevents the state or any of its governmental subdivisions from extending the state’s credit to private enterprise.” *Japp v. Papio-Missouri River Natural Resources Dist.*, 273 Neb. 779, 787, 733 N.W.2d 551, 558 (2007).

For purposes of the Cities Airport Authorities Act, Neb. Rev. Stat. §§ 3-501 to 3-514 (2012 and Cum. Supp. 2018), an “authority” is defined as “an airport authority which shall be a body politic and corporate organized pursuant to section 3-502.” Neb. Rev. Stat. 3-501(1) (2012). Any city may create an airport authority to be managed by a board and that board “shall be a body corporate and politic, constituting a public corporation and an agency of the city for which such board is established.” Neb. Rev. Stat. § 3-502 (Cum.

Supp. 2018). An airport authority is granted extensive powers, including the authority to issue bonds and to levy taxes. Neb. Rev. Stat. § 3-504(12) and (15) (2012).

While an airport authority is described at § 3-502 as “an agency of the city” the Nebraska Supreme Court has held that a city airport authority is a separate and independent corporate entity and not “merely an agent of the city in the same sense as a municipal department, commission, or board” as argued by the plaintiff in *Lock v. City of Imperial*, 182 Neb. 526, 529, 155 N.W.2d 924, 925 (1968) [*Lock*]. In that personal injury action, the Court held that the City of Imperial was not the proper party defendant because the airport authority “is a supplementary, separate, and independent public corporation, and the parent municipal corporation is not liable for the torts of the authority.” *Id.* at 531, 155 N.W.2d at 927.

In a more recent case, *Brothers v. Kimball County Hospital*, 289 Neb. 879, 857 N.W.2d 789 (2015), the Court was required to determine whether a county hospital was a separate and distinct political subdivision from the county for purposes of the Political Subdivisions Tort Claims Act. In its analysis the Court referred to *Lock* as a case holding “that a city airport authority was an independent political subdivision.” *Id.* at 886, 857 N.W.2d at 796.

Our office has previously determined that a city airport authority is a political subdivision in an opinion considering whether the Atkinson Airport Authority was subject to inspection by the State Electrical Division. Op. Att’y Gen. No. 91030 (April 16, 1991). We also concluded that a city airport authority is a political subdivision for purposes of a bill that required that the county clerk set a preliminary tax rate for each political subdivision which levied property taxes in the county the previous year. Op. Att’y Gen. No. 96065 (August 22, 1996).

In our view, a city airport authority is a political subdivision which is governed by the constitutional prohibition against lending the credit of the state.

II. Whether Authorizing A City Airport Authority To Offer Minimum Revenue Guarantees Violates The Prohibition On Lending The Credit Of the State.

You ask whether a proposed bill, that would amend Neb. Rev. Stat. § 3-504.02 to authorize city airport authorities to offer minimum revenue guarantees to airlines offering to provide new service to cities, would violate the constitutional prohibition on lending the credit of the state. As stated above, Neb. Const. art. XIII, § 3 prohibits extending the credit of the state to any individual, association, or corporation.¹

¹ Your letter states that the proposed minimum revenue guarantees would be funded through property taxes levied pursuant to Neb. Rev. Stat. § 3-504.02. Our determination whether the offering of guarantees would violate art. XIII, § 3 might be different if the funding source for the guarantees was non-state funds. For example, in a prior opinion, we stated the expenditure of federal funds received by the state would generally not be restricted by art. XIII, § 3. Op. Att’y Gen. No. 95034 (April 26, 1995). However we also

The Nebraska Supreme Court interpreted art. XIII, § 3 in *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991) [*"Haman"*]. At issue in *Haman* was legislation which appropriated state tax money to compensate depositors who had suffered losses due to the failure of industrial loan and investment companies in Nebraska. The Court set out a three-prong test, stating that a plaintiff had to prove each of the following elements to establish a law violated this constitutional provision: (1) The credit of the state (2) was given or loaned, (3) in aid of any individual, association, or corporation. *Id.* at 719, 467 N.W.2d at 850.²

Regarding the first element of the test, the credit of the state, the Court distinguished the loaning of the state's credit from the loaning of state funds. "The state's credit is inherently the power to levy taxes and involves the obligation of its general fund. 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.* at 719-20, 467 N.W.2d at 850 (citation omitted). The Court further explained that "the purpose of article XIII, § 3 of Nebraska's Constitution is to prevent the state or any of its governmental subdivisions from extending the state's credit to private enterprise. It is designed to prohibit the state from acting as a surety or guarantor of the debt of another." *Id.* at 718, 467 N.W.2d at 850 (citation omitted). Therefore, the bill in question in *Haman*, which would have obligated the state's general fund to pay off the guaranties of a private corporation, was held to violate article XIII, § 3.

Haman is consistent with prior Nebraska cases finding violations of art. XIII, § 3. See *Oxnard Beet Sugar Co. v. State*, 73 Neb. 57, 105 N.W. 716 (1905) (Statute offering compensation or a bounty to private companies to encourage the manufacture of sugar and chicory violated this constitutional prohibition); *State ex rel. Beck v. City of York*, 164 Neb. 223, 82 N.W.2d 269 (1957) (City's issuance of revenue bonds in its name and use of those bonds for a private project unconstitutionally loaned its credit for the benefit of a private party). On the other hand, the Court has found no constitutional violation when

pointed out that, if the state was placed in the position of a surety or guarantor as a term or condition of receiving the federal funds, the receipt and expenditure of federal funds under those conditions would still violate this constitutional prohibition.

² "Closely related to the prohibition against the giving or lending of the state's credit, although technically not part of the prohibition . . . is the principle of law that public funds cannot be expended for private purposes." *Haman* at 721-22, 467 N.W.2d at 851. We will not discuss whether the proposed bill you describe would entail the expenditure of public funds for private purposes as the Court has also stated that the prohibition of art. XIII, § 3 "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, 467 N.W.2d at 852. As we conclude that the legislation would run afoul of art. XIII, § 3, it is unnecessary to engage in a discussion of public purpose.

the legislation in question did not put the state or one of its political subdivisions in the position of a debtor or guarantor. Statutes creating an ethanol tax credit program were found to be constitutional in *Callan v. Balka*, 248 Neb. 469, 536 N.W.2d 47 (1995). Although the motor fuel taxes collected were reduced because of the ethanol credits, the state remained a creditor of the taxpayer and was never obligated to pay any money or extend the credit of the state. And, in *Japp v. Papio-Missouri River Natural Resources Dist.*, 273 Neb. 779, 733 N.W.2d 551 (2007), the Court found no constitutional violation when a natural resources district agreed to pay for the construction of two dams in a private commercial and residential development. The Court first noted that the projects fulfilled the statutory purpose of the District. Further, the Court found that the "state merely agreed to *expend* funds; it did not pledge its credit as an inducement to gain benefit or provide financial backing for the private developers." *Id.* at 789, 733 N.W.2d at 559 (emphasis in original).

CONCLUSION

Your request relates to legislation that would authorize city airport authorities to "make grants and loans, and offer revenue guarantees, to airlines offering to provide new and additional service to such cities." Your specific concern is the language that would authorize minimum revenue guarantees by which the airport authority would agree to compensate a private contractor if actual revenue fell below a specified threshold. Based on the analysis above, it is our opinion that legislation authorizing a city airport authority to offer minimum revenue guarantees to a private contractor would violate art. XIII, § 3 as it would obligate the airport authority to lend the credit of the state and place the airport authority in the position of a guarantor.

Sincerely,

DOUGLAS J. PETERSON
Attorney General


Lynn A. Melson
Assistant Attorney General

Approved by:



Attorney General

pc: Patrick J. O'Donnell
Clerk of the Nebraska Legislature