NEBRASKA DEPARTMENT OF JUSTICE

Opinion No. 24-002 — April 5, 2024

OPINION FOR SENATORS BRAD VON GILLERN AND RAY AGUILAR

Constitutionality of the Proposed Amendment to the Sports Arena Facility Financing Assistance Act

Summary: L.B. 1197, a proposed amendment to the Sports Arena Facility Financing Assistance Act, does not violate Nebraska's constitutional prohibition against the lending of the credit of the State or the related principle prohibiting the spending of public money for a private purpose. The structure of L.B. 1197 ensures that a public body will have a sufficient degree of control over any private entity that can apply to, receive, or otherwise benefit from public funding made available under the Sports Arena Facility Financing Act. This structure alleviates any facial constitutional concern.

L.B. 1197 proposes changes to the Sports Arena Facility Financing Assistance Act, Neb. Rev. Stat. § 13-3101 to 13-3109, a statute which permits eligible facilities to apply for state financial assistance for certain statutorily delineated purposes, such as the repayment of "amounts expended or borrowed . . . to acquire, construct, improve, or equip the eligible . . . facility." Neb. Rev. Stat. § 13-3103(1). As amended, L.B. 1197 would expand the definition of "eligible sports arena facility," modifying it to include "any privately owned sports complex." *See* AM 2715 to L.B. 1197, § 2(8)(e), 108th Leg. 2nd Sess. (2024).[1] That expansion comes with a limitation: Privately owned

[1] L.B. 1197 primarily amends a section currently codified at Neb. Rev. Stat. § 13-3102. The entire Act is currently codified at Neb. Rev. Stat. §§ 13-3101 to 13-3109.

complexes are required to use any financial assistance they receive in certain specified ways (outlined in greater detail below). *See id.* § 3(4). You have asked for an opinion regarding the constitutionality of L.B. 1197, specifically the constitutionality of the bill as amended by AM 2715.

A statute that allows a privately owned entity to receive state funds implicates Article XIII, § 3 of the Nebraska Constitution ("Section 3"), which (except for a limited exception not pertinent here) forbids "the credit of the state" from being "given or loaned in aid of any individual, association, or corporation." Neb. Const. Art. XIII, § 3. Analyzing the constitutionality of L.B. 1197 thus requires an analysis of the application of Section 3 and the related "fundamental principle that public moneys may not be used for private purposes." *State ex rel. Beck v. City of York*, 164 Neb. 223, 225, 82 N.W.2d 269, 271 (1957). We conclude that L.B. 1197, as amended, neither infringes Section 3 nor runs afoul of this related principle.

The Sports Arena Facility Financing Assistance Act was first enacted in 2010 as part of L.B. 779. *See* L.B. 779, §§ 7–15, 101st Leg., 2nd Sess. (2010) (enacted). L.B. 779 established a system by which political subdivisions could apply for "state assistance" to pay back "amounts expended or borrowed" through the issuance of a bond to "acquire, construct, improve, or equip an eligible sports arena facility." *Id.* § 9. The "state assistance" that subdivisions could apply for was drawn from increased sales tax revenue generated by retailers in the geographic vicinity of an eligible arena facility. *See id.* § 14. At the time L.B. 779 was enacted, "eligible sports arena facility" was defined to include only "publicly owned" sports complexes of a certain size that also met various other characteristics. *Id.* § 8(3)(a).

Since its initial enactment in 2010, the Sports Arena Facility Financing Assistance Act has been

amended several times.[2] These various amendments have often expanded the scope of the defined term "eligible sports arena facility," bringing a wider array of projects within its ambit. For example, in 2023, L.B. 727 expanded the definition to include "privately owned concert venue[s]." L.B. 727, § 25(8)(d), 108th Leg. 1st, Sess. (2023) (enacted). Nevertheless, the general structure of the Sports Arena Facility Financing Act, in which sales tax revenue generated in the vicinity of an eligible project is used to fund state assistance that can be used to repay indebtedness incurred by a public entity to buy, build, remodel, or outfit an eligible sports arena facility has remained constant.

L.B. 1197, as introduced, retained this basic structure. *See* L.B. 1197, 108th Leg. 2nd Sess. (2024) (introduced). Like previous modifications to the Sports Arena Facility Financing Assistance Act, L.B. 1197 proposed to alter the statutory definition that governs when state assistance is potentially available. *Id.* Most notably, the introduced version of L.B. 1197 incorporated language that makes "privately owned" sports complexes eligible for state assistance, subject to certain restrictions. *Id.* § 2(4). The version of L.B. 1197 currently under consideration—Amendment 2715, which is a so-called "white copy" amendment which strikes the original language of the bill in its entirety and introduces a new version of the bill—retains this proposed change. AM 2715 to L.B. 1197, § 2(4), 108th Leg. 2nd Sess. (2024).[3]

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[2] *See, e.g.*, L.B. 884, § 6, 104th Leg. 2nd Sess. (2016) (enacted); L.B. 39, § 2, 107th Leg., 1st Sess. (2021) (enacted); L.B. 927, § 6, 107th Leg., 2nd Sess. (2022) (enacted); L.B. 727, § 25(8)(d), 108th Leg. 1st, Sess. (2023) (enacted).

[3] Unless otherwise noted, any subsequent references to L.B. 1197 refer to L.B. 1197 as amended by AM 2715.

The bottom-line question is whether L.B. 1197 facially violates Section 3 or the related fundamental principle that our Supreme Court has held to flow therefrom. We believe it does not. When a public body either has control over or a sufficient ownership interest in a privately owned recipient of state money, the constitutional prohibition against the lending the credit of the State is likely not infringed. Here, L.B. 1197 is structured in such a way that private recipients of state money are subject to a sufficient degree of public control. The various control mechanisms built into the statute (many of which have long been features of the Sports Arena Facility Financing Act) are designed to ensure that public money is spent for a permissible public (as opposed to an impermissible private) purpose. The existence of these statutory guardrails means that, in most circumstances,[4] state money spent to extinguish debt associated with a privately owned eligible sports arena facility will nevertheless have been expended for a public purpose. Because that is so, we believe it likely that L.B. 1197 would survive facial constitutional scrutiny.

I.

A.

We begin with an examination of the text and purpose of Section 3, as informed by the history underlying its inclusion in the Constitution.

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[4] As discussed below, *see* pp. 16, 18–21, *infra*, we acknowledge the possibility that, in rare circumstances and despite the guardrails built into the statute, state assistance might result in state money being unconstitutionally spent for a private rather than public purpose. On such a rare occasion, an as-applied Section 3 challenge to a purportedly unconstitutional expenditure might be warranted.

i.

The text of Section 3 provides, in pertinent part, that:

> 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.

Neb. Const. Art. XIII, § 3.

"Many jurisdictions have a state constitutional provision which expressly forbids the state or its political subdivisions from lending their credit to any individual or private corporation or association." John Martinez, 4 Local Government Law § 25:7 (West 2d. 2023). "[T]he mischief sought to be remedied is the use of public credit or funds to further *private* enterprise." *Id.* (emphasis in original). By contrast, when a State "uses, rather than lends, its credit, there is no infringement of a constitutional prohibition as to a loan of the State's credit." 81A C.J.S. States § 360 (2024).

As our Supreme Court explained in *Haman v. Marsh*, the "historical genesis" of state-level constitutional prohibitions like and including Section 3 was the "reaction of public opinion to the . . . extravagant dissipation of public funds by counties, townships, cities and towns in aid of the construction of railways, canals, and other like undertakings during the half century preceding 1880." 237 Neb. 699, 718, 467 N.W.2d 836, 850 (1991) (quoting *State v. Northwestern Mutual Insurance Co.*, 340 P.2d 200, 201 (Ariz. 1959)); *see also Beck*, 164 Neb. 223 at 225, 82 N.W.2d at 271 (Section 3 "protect[s] the State and its political

subdivisions against reckless financial involvement in private enterprises supposed to serve the public good but which are in fact dominated by private interest."). The very purpose of Section 3 is to ensure the State does not become unnecessarily entangled with the endeavors of private enterprise. As its plain text indicates, Section 3 is "designed to prohibit the state from acting as a surety or guarantor of the debt of another." *Haman v. Marsh*, 237 Neb. 699, 718, 467 N.W.2d 836, 850 (1991).

In light of this historical context, our Supreme Court has stated that Section 3 was "designed . . . to prevent the use of public funds raised by general taxation in aid of enterprises apparently devoted to quasi public purposes, but actually engaged in private business." *Haman,* 237 Neb. at 718, 467 N.W.2d at 850 (emphasis omitted) (internal quotation marks and citations omitted).[5]

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[5] Our acknowledgment of this historical context and this Opinion's embrace of precedent articulating an atextual (but perhaps strongly implied) prohibition regarding the expenditure of public money for private purposes should not be understood as an uncritical, unreserved endorsement of the Court's Section 3 jurisprudence, especially those portions that pour gloss atop the constitutional text. *See, e.g., Beck*, 164 Neb. at 227, 82 N.W.2d at 272 (suggesting that a bond's increased marketability, flowing from mere association with a government body, represents a lending of the State's credit); *Japp v Papio-Missouri River Nat. Res. Dist.*, 273 Neb. 779, 788, 733 N.W.2d 551, 558 (2007) (reiterating sentiments from *Beck* regarding the "greater marketability" of certain bonds). Authority from the Supreme Court interpreting a constitutional provision is, of course, authoritative and binding unless and until it is overruled or altered, either by the Court in a future decision or the People via the process of amending the Constitution. Nevertheless, it is "the Constitution which [a Supreme Court Justice has] swor[n] to support and defend, not the gloss which his predecessors may have put on it." *South Carolina v. Gathers*, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting) (quoting William O. Douglas, *Stare*

Accordingly, "[t]he Legislature cannot appropriate the public moneys of the state to encourage private enterprises," *Oxnard Beet Sugar Co. v. State*, 73 Neb. 57, 105 N.W. 716, 717 (1905), because "[t]he financing of private enterprises with public funds is foreign to the fundamental concepts of our constitutional system," *Beck*, 164 Neb. at 229–30 , 82 N.W.2d at 273.

That does not mean, however, that there is a constitutional problem any time state monies are pledged to or otherwise end up in the hands of a private entity. As a matter of common sense, it would be nearly impossible for the government to function if it was constitutionally forbidden from engaging in commerce or entering into contractual agreements with private businesses. That is why Section 3 is not implicated when the State "merely agree[s] to expend funds." *Japp v. Papio-Missouri River Nat. Res. Dist.*, 273 Neb. 779, 789, 733 N.W.2d 551, 559 (2007) (emphasis omitted). A private entity's receipt of government funds is not inherently unconstitutional. *See Chase v. Douglas County,* 195 Neb. 838, 847, 241 N.W.2d 334, 340 (1976) (recognizing that "public purposes" can be "accomplish[ed] . . . through private organizations"); *see also Lenstrom v. Thone,* 209 Neb. 783, 790, 311 N.W.2d 884, 888 (1981) ("Legislation which serves a public purpose is not constitutionally impermissible because incidental benefits may accrue to others."). Article XIII, Section 3 simply establishes "limits beyond which the Legislature cannot go." *Beck*, 164 Neb. at 230, 82 N.W.2d at 273. It ensures that neither the State nor any of its subdivisions can "spend public money, or lend or give away, directly or indirectly, its credit or property for a purpose which is not a public one." *Id.*

Decisis, 49 Colum. L. Rev. 735, 736 (1949)). That, too, is our Office's lodestar.

The facts of *Japp* illustrate this principle in action. There, a Natural Resources District entered into an agreement with private real estate developers to fund the construction of two dams on a tributary of Papillion Creek flowing through the developers' property. The District pledged millions of dollars to defray most (but not all) of the "costs of design, construction, project administration, permits, and project land rights" necessary for the dams' construction. *Id.* at 782, 733 N.W.2d at 554. The Supreme Court characterized the agreement as the District "agreeing to pay for the [two] dams" but nevertheless concluded that the District had not violated Section 3. *Id.* at 788, 733 N.W.2d at 558–59. The Court explained that although the District was partnering with private entities who would thus receive public money, the expenditure was permissible because the District had not "use[d] its credit to secure capital for a *private project* or agree to act *as a guarantor* for a private company." *Id.* (emphasis added). Instead, the District was simply working in tandem with the developers by "provid[ing] funds for a project that would carry out its statutory purposes." *Id.* at 788–89, 733 N.W.2d at 559.

The question remains: What is the dividing line between a public and private purpose? We turn to that next.

ii.

Generally speaking, "[a] public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all." *State ex rel. Douglas v. Nebraska Mortg. Fin. Fund*, 204 Neb. 445, 458, 283 N.W.2d 12, 21 (1979).[6] Beyond that general guidance, "[n]o hard and fast rule can be laid down for determining whether a proposed expenditure of public

[6] *Cf.* Neb. Rev. Stat. § 77-202(a)(ii).

funds is . . . [for] a public use or purpose. Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare." *Id.*

There is an initial presumption that "[i]t is for the Legislature to decide in the first instance what is and what is not a public purpose." *Lenstrom*, 209 Neb. at 789, 311 N.W.2d at 888. Legislative declaration is not, however, dispositive. *Chase*, 195 Neb. at 846, 241 N.W.2d at 339 (the Legislature's "determination is not conclusive on the courts"). When the absence of a public purpose is "clear and palpable . . . to the reasonable mind," a court should declare a statute authorizing an expenditure to a private entity invalid. *Lenstrom*, 209 Neb. at 789–90, 311 N.W.2d at 888.

Beck provides useful guidance on this front. When public money is expended on behalf of a "private corporation for *private profit and private gain*," that expenditure "serves no public . . . purpose." *Beck*, 164 Neb. at 230, 82 N.W.2d at 274 (emphasis added).

It was the application of this principle that controlled the outcome in *Chase v. Douglas County*. At issue there was a law that allowed political subdivisions to spend public money on certain types of development, including the mounting of a "publicity campaign" designed to attract new businesses and the "purchas[e] [of] real estate suitable for industrial development." 195 Neb. at 840–41, 241 N.W.2d at 337. The law was challenged on that grounds that it unconstitutionally "authorize[d] public funds to be used for private purposes." *Id.* at 841, 241 N.W.2d at 337. As noted above, *Chase* recognized that it is possible to undertake a "public purpose through [a] private organization[]." *Id.* at 847, 241 N.W.2d at 340. In *Chase*, the Court ultimately held that the portion of the statute authorizing expenditures on a publicity campaign was

constitutional, but the portion authorizing the acquisition of real estate was not. *Id.* at 845, 241 N.W.2d at 339.

Expounding on why the real estate acquisition portion ran afoul of Section 3, the Court explained that for real estate to be "effectively used for industrial development, it must first in some way come into the use and possession of the private persons or entities which may engage in industry." *Id.* at 848, 241 N.W.2d at 340. Necessarily then, the expenditure of public money to acquire real estate would "result[] in capital being furnished by the city or county for private use." *Id.* at 849, 241 N.W.2d at 341. This was so, "[e]ven if title [to the property] [wa]s held by [a locality]" because the locality bore all the risk of loss (such as the possible depreciation of the property value) while the private entity would enjoy the "benefit of [any] increase." *Id.* at 850, 241 N.W.2d at 341. In short, the real estate acquisition provision was constitutionally problematic because it facilitated the prospect of purely "private profit and private gain," *Beck*, 164 Neb. at 230, 82 N.W.2d at 274,[7] while leaving the public on the hook in the event of a loss. *See Haman*, 237 Neb. at 722, 467 N.W.2d at 852 (emphasizing that it was the risk of loss borne by the locality that was deemed constitutionally problematic in *Chase*).

[7] Of course, a successful industrial development program would likely result in "general benefit[s] to the economy of [the local] community" such as increased "employment for [its] citizens." *Beck*, 164 Neb. at 230, 82 N.W.2d at 274. The *Beck* court concluded, however, that this sort of general benefit "does not justify the use of public funds" to "assist a private corporation that is engaged in an enterprise for profit." *Id.* at 230, 82 N.W.2d at 273–74.

B.

Concerns about private profit and inappropriate exposure to risk—hallmarks of expenditures that violate Section 3—can be effectively alleviated in a number of ways. Two are particularly relevant here.

First, ownership. When public money is expended on a project or endeavor involving a private entity, securing an ownership interest in the fruits of that public-private partnership effectively nullifies both concerns. So long as the ownership interest is commensurate with the value of the expenditure, the government shares both any potential profits and the burden of any losses proportionately with its private partner or partners. This alleviates any concern that the State is "acting as a surety or guarantor." *Haman*, 237 Neb.at 718, 467 N.W.2d at 850. There can be little doubt that where a government entity has a representative ownership stake in a project, the concerns animating Section 3 are not present.[8]

Second, control. When the government exercises sufficient control over a project involving a private entity that will be the recipient of public money, the dangers discussed above are minimized. The structure of the Sports Arena Facility Financing Assistance Act provides a ready example. In its present form, an "eligible sports arena facility" can apply for "state assistance" which is, practically speaking, redirected state sales tax revenue collected from the geographic vicinity of an eligible facility and ultimately paid to the assistance recipient from the coffers of the Sports Arena Facility Support Fund. *See* Neb.

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[8] Nothing in this Opinion should be construed to suggest that an ownership interest insulates government action from other statutory or constitutional objections, such as a claim that the action in question is ultra vires or otherwise unauthorized for reasons unrelated to Section 3.

Rev. Stat. §§ 13-3102, 13-3103, 13-3107, 13-3108. At present, the Act includes within the definition of "eligible sports arena facility" any "privately owned concert venue." *Id.* § 13-3102(8)(d). Thus, even without adoption of L.B. 1197, *some* private entities can already receive public funds under the Sports Arena Facility Financing Assistance Act.[9]

An examination of the current structure of the Act leads us to believe it is at least facially constitutional. Numerous provisions ensure that the public entities involved have a significant degree of control over any private entity that stands to receive or benefit from state assistance available under the Act. The process of applying for such assistance *requires* the involvement of a political subdivision; a private entity cannot apply for assistance without a government partner. *See* Neb. Rev. Stat. § 13-3102(1). Any assistance granted must be used for one of a limited number of statutorily delineated purposes. *See id.* § 13-3103(3). When applying for assistance, applicants must provide a "detailed description" outlining how the assistance will be used "in furtherance of the applicant's public use or public purpose" if the assistance will be "expended through one or more private organizations." *Id.* § 13-3104(3)(a). Assistance cannot be used as an "operating subsidy." Neb. Rev. Stat. § 13-3108(8). The Act also authorizes the government partner to secure its

[9] Privately owned concert venues can use state assistance for only two purposes—"to acquire, construct, improve, or equip a nearby parking facility" or "to promote arts and cultural events which are open to or made available to the general public." Neb. Rev. Stat. § 13-3103(3). Furthermore, as discussed below, ultimately, the Act expressly requires private entities to use any assistance they receive for a public purpose, *id.* § 13-3104(5), and private entities have a special obligation to describe how any assistance they receive will be used "in furtherance of . . . a public use or public purpose" during the application and approval process, *id.* § 13-3104(3)(a).

interest in the fruits of the project by way of a "mortgage or deed of trust encumbering all or any portion" of the relevant sports arena facility. *Id.* § 13-3109(1). And perhaps most relevant of all, the Act explicitly requires that all "state assistance received pursuant to the [A]ct shall be used only for public purposes." *Id.* § 13-3104(5).

Taken together, these statutory features help ensure that public money is used only for a public purpose. They also minimize the risk that a government entity will be left with a substantial loss in the event the project financed via state assistance is unprofitable.[10] This degree of control is sufficient to allow a statute to survive Section 3 scrutiny. *See Haman*, 237 Neb. at 722, 467 N.W.2d at 852 (explaining that a statute's public purpose is "not vitiated" by the involvement of a private entity when "specific controls on the use of the [government] funds [are] attached").

That is not to say that the control exercised over a private entity *must* flow from statutory text itself; other oversight mechanisms are possible. For example, public money received and spent by so-called "63-20" entities, a special class of private nonprofits that meet the requirements of Internal Revenue Service Revenue Ruling 63-20, *See* Rev. Rul. 63-20, 1963-1 C.B. 24 (1963), is likely

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[10] Indeed, the Act's front-end restrictions on the permissible uses of state assistance are designed to ensure that any project funded will serve a public purpose and thereby guarantee that the public will receive *some* benefit even if the project is unsuccessful, nullifying the central policy concern that was the impetus for Section 3. *See Haman*, 237 Neb. at 719, 467 N.W.2d at 850 (constitutional prohibitions on the lending of the credit of the State, such as Section 3, were "designed primarily to prevent the use of public funds raised by general taxation in aid of enterprises apparently devoted to *quasi* public purposes, but actually engaged in private business.") (quoting *Northwestern Mutual*, 340 P.2d at 201)).

constitutional. These entities are, by design, "essentially public in nature" even if, as a formal legal matter, their existence is separate and apart from the government entity that creates them. *Id.* The express purpose of a 63-20 nonprofit is to serve as a corporate vehicle for housing debt that would otherwise be accrued by a related government entity for the purpose of "stimulating industrial development." *Id.*

The requirements for establishing a 63-20 entity illustrate why there is no constitutional impediment to their receipt of public money. A 63-20 entity must:

1) be approved by the related government entity whose indebtedness it is a vehicle for;
2) engage in activities which are essentially public in nature;
3) be one which is not organized for profit (except to the extent profits are used to retire indebtedness);
4) not have the 63-20 entity's corporate income inure to any private person;
5) extend a beneficial interest to the government body that established it while any indebtedness remains outstanding;
6) hand over to that related government body full legal title to any property acquired by the 63-20 entity through the indebtedness occurred;
7) have the specific debt obligations which the 63-20 entity will incur be approved by the related government body.

Rev. Rul. 63-20, 1963-1 C.B. 24 (1963). If these requirements are met, the actions of a 63-20 entity are considered to be "on behalf of" the related, organizing government entity, even though, technically, the 63-20 is a wholly private creature. *Id.*; *see, e.g. Times of Trenton Pub. Corp. v. Lafayette Yard Cmty. Dev. Corp.*, 874 A.2d 1064,

1066 (N.J. 2005) (holding that although a 63-20 entity is a "private, nonprofit corporation" it should be treated as if it were a "public body").

The control mechanisms discussed above do not represent the complete universe of ways by which a public body can exercise sufficient control over private entity and thereby insulate an expenditure of public funds from the reach of Section 3. It is beyond the scope of this Opinion to identify every conceivable structure that might pass constitutional muster. For preset purposes articulation of general principles is sufficient. When a public body has sufficient control over the operations of a private entity, it is likely that any public money expended by the private entity will be spent for a public purpose rather than a private one. And as discussed above, *see* p. 7, *supra*, an expenditure of public money for a public purpose does not become unconstitutional simply because a private entity is involved with or actually makes that expenditure.

II.

Having set forth the authority that guides our analysis, we consider the proposed text of L.B. 1197 currently under consideration by the Legislature. *See* AM 2715, L.B. 1197, 108th Leg. 2nd Sess. (2024).

As noted above, the primary change contemplated by L.B. 1197 is an expansion of the definition of "eligible sports arena facility" to include "any privately owned sports complex, including concession areas, parking facilities, and onsite administrative offices connected with operating the sports complex." *Id.* § 2(8)(e). Because this expanded definition would open the door to the expenditure of public money by a private entity, the constitutional restriction represented by Section 3 is implicated. *See* pp. 2, 5–7, *supra*. However, because L.B. 1197 retains the already extant statutory features that

ensure private entities that receive state assistance are subject to sufficient government control, *see* pp. 12–13, *supra*, and adds new measures that reinforce and bolster those that already exist, it is likely that L.B. 1197, if enacted, will survive contact with Section 3.

At the threshold, L.B. 1197 retains the requirement that an application for state assistance involve a government entity. *Id.* §1(1). The only proposed change to that section—substituting the word "corporation" in place of the existing "organization" language—does not displace the requirement that an "applicant" be either "a political subdivision" or a "political subdivision" working in tandem with a nonprofit. *Id.* This represents a key measure of government control. It is safe to presume that localities and other political subdivisions are unlikely to partner with private entities that seek to pursue a private, rather than public purpose. (And, if they do engage in such a partnership, they run the risk of an as-applied Section 3 constitutional challenge.) This presumption is reinforced by the retention of the requirement, currently found at Neb. Rev. Stat. § 13-3104(5), that "[a]ny state assistance received pursuant to the [A]ct shall be used only for public purposes."

The presumption is further reinforced by new language, a definition of "governmental use," that is included in in L.B. 1197. AM 2715 to L.B. 1197, §2(10) 108th Leg. 2nd Sess. (2024). "Governmental use" is defined to mean "operational control and use by [a] political subdivision for a statutorily permitted purpose of the political subdivision." *Id.* This new definition is incorporated into another newly added provision that limits the permissible uses to which state assistance afforded to privately owned sports complexes can be put, discussed in greater detail below. It is worth noting here, however, that such a definition, which emphasizes the importance of "control and use" by a governmental entity

and makes express reference to that entity's "statutorily permitted purpose" is congruent with the authority discussed above, such as *Beck* and *Japp*. *See* pp. 5, 7–9, *supra*.

Before discussing the completely new restrictions that condition the use of assistance with respect to a privately owned facility, we briefly note that L.B. 1197 proposes an expansion that is a direct analogue to an already existing category where assistance can flow to a private entity. As noted above, *see* pp. 11–12, *supra*, the Act already allows assistance to be go privately owned concert venues for certain purposes, including the promotion of "arts and cultural events which are open to or made available to the general public." Neb. Rev. Stat. § 13-3103(3). L.B. 1197 would essentially expand that category to include the promotion of "sporting events which are open to or made available to the general public." AM 2715 to L.B. 1197, § 3(4)(c), 108th Leg. 2nd Sess. (2024). This expanded category would be subject to the same restrictions that currently governs the promotion of arts and cultural events. *See, e.g., id.* § 3(3)(b). For the reasons already discussed above, we believe this category was constitutional and see no reason why that conclusion would change if expanded as proposed.

All that is left to assess are the two remaining ways that assistance can be used with respect to a privately owned complex. Those are:

(a) to pay back amounts expended or borrowed through one or more issues of bonds to be expended by the applicant to acquire, construct, improve, or equip a privately owned sports complex, and
(b) to lease all or a portion of such privately owned sports complex for the governmental use of the political subdivision.

Id. § 3(4).

We consider first subsection (b), the easier of the two provisions to assess. As previewed above, there can be little doubt that a provision that conditions the use of state assistance in the manner that subsection (b) does—by incorporating the new term "governmental use"—can survive constitutional scrutiny. A governmental use, by definition, involves "operational control" by a public body. *Id.* § 2(10). As we have already stated, when a public body has sufficient control over a private entity that will receive and expend public money, that control obviates the policy concerns underlying Section 3. Simply put, when a public body has operational control, it is unlikely that expenditures of public money will be "dominated by private interest." *Beck*, 164 Neb. at 225, 82 N.W.2d at 271. That is especially true when, as in *Japp*, the expenditures in question are aimed at "carry[ing] out [one of the public body's] statutory purposes." 273 Neb at 788–89, 733 N.W.2d at 559.

Subsection (a), considered in isolation, presents a much closer call. It contains no equivalent to subsection (b)'s inclusion of "governmental purpose" nor the sorts of additional restrictions that the existing Act imposed on assistance flowing to private concert venues (the same restrictions which L.B. 1197 proposes to extend to the promotion of sporting events). The existing version of the Act permits privately owned concert venues to receive assistance to "acquire, construct, improve, or equip" a "*nearby parking facility*." Neb. Rev. Stat. § 13-3103(3) (emphasis added). By comparison, L.B. 1197 proposes to allow privately owned sports complexes to receive assistance to "to acquire, construct, improve, or equip" the *complex itself*. AM 2715 to L.B. 1197, §3(4)(a), 108th Leg. 2nd Sess. (2024) (emphasis added). The potential for both significant private profit and private gain, as well as the

possibility that the public will be left holding the bag if a privately owned facility is economically unviable, is obvious. After all, many (though not all) sports complexes are multimillion (or even multibillion) dollar endeavors.[11] Thus, this subsection presents a heightened risk of authorizing expenditures that will violate Section 3.

Having said as much, we do not think subsection (a) is facially unconstitutional. State assistance made available under that subsection is still subject to the numerous other safeguards built into the overall structure of the Act. A private sports complex must still partner with a public body to even apply for state assistance, that public body can secure an interest in the facility by way of a mortgage or deed encumbering it, and any assistance awarded is expressly required to be used for a public, rather than private, purpose. In many circumstances—especially when these statutory measures of control are paired with either an ownership stake or some non-statutory mechanism designed to alleviate the constitutional considerations discussed at length above, *see* pp. 4–8, *supra*—it is likely that state assistance can be awarded to and spent by a privately owned sports complex without violating Section 3.

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[11] For example, Charles Schwab Field Omaha (formerly TD Ameritrade Park Omaha), the host venue for the College World Series and home of Creighton University baseball, which opened in 2011, had a construction cost of approximately $130 million. *See* ME-Engineers, *Our Projects: TD Ameritrade Park Omaha*, https://perma.cc/72BU-622S. By contrast, SoFi Stadium, the home venue for the NFL's Los Angeles Rams and Los Angeles Chargers, which opened in 2020, had a reported construction cost of approximately $5.5 billion. Rudi Schuller, *Los Angeles Rams & Chargers Stadium: What is SoFi Stadium's capacity and how much did it cost?*, Dazn.com (Oct. 2023), https://perma.cc/X5VW-EA62.

To be clear, we note that it is certainly possible to imagine scenarios where assistance awarded under the auspices of subsection (a) would constitute an impermissible, unconstitutional expenditure of public money for a private purpose. Nothing in this Opinion should be understood as casting doubt on the viability of an as-applied Section 3 challenge to an award of state assistance that would "secure capital for a private project" or effectively results in a public body "act[ing] as a guarantor for a private company." *Japp*, 273 Neb. at 788, 733 N.W.2d at 559. That is so even if the privately owned complex is ostensibly working in tandem with a public body. The prohibition that flows from Section 3 is a limit "beyond which the [government] cannot go." *Beck*, 164 Neb. at 230, 82 N.W.2d at 273. The Supreme Court has made clear that when the principles that animate Section 3 are infringed, a governmental declaration that a truly private project actually has a public purpose is empty *ipse dixit*.

That said, the mere potential of an unconstitutional use does not doom a statute. For one, there is a strong presumption that public bodies will act within statutory and constitutional constraints. *See State v. Hess*, 261 Neb. 368, 377, 622 N.W.2d 891, 900–01 (2001); *Niklaus v. Miller*, 159 Neb. 301, 306, 66 N.W.2d 824, 828 (1954). For another, requests for state assistance must be approved by a Board consisting of "the Governor, the State Treasurer, the chairperson of the Nebraska Investment Council, the chairperson of the Nebraska State Board of Public Accountancy, and a professor of economics on the faculty of a state postsecondary educational institution . . . appointed . . . by the Coordinating Commission for Postsecondary Education." Neb. Rev. Stat. § 13-3102(2); *see also id.* § 13-3106(1) (providing that the board has discretion to approve projects "if [it] finds that the project . . . is eligible and that state assistance is in the best interest of the state" and reject those that do not). We find it unlikely that many unconstitutional projects will find a

locality willing to shoulder the considerable financial risk and downside of a purely private project. It is even more unlikely that such a project will make it through the Board's eligibility and "best interest of the state" review. Surmounting both will be an even taller task. And for the few private projects that might manage to slip through the cracks, as-applied Section 3 litigation provides a final failsafe.

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Having reviewed the proposed text of L.B. 1197, we find no facial constitutional infirmity. While there may be rare instances where state assistance awarded under its auspices runs afoul of Section 3, if enacted as currently proposed, L.B. 1197 should survive facial constitutional scrutiny.

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