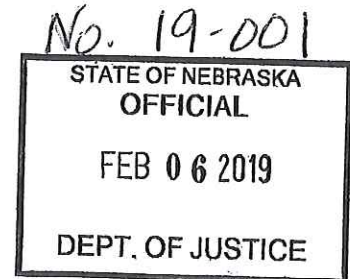


STATE OF NEBRASKA  
**Office of the Attorney General**

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:** Constitutionality of Proposed Financing Plan for State Highway Construction Project.

**REQUESTED BY:** Kyle Schneweis, P.E., Director  
Nebraska Department of Transportation

**WRITTEN BY:** Douglas J. Peterson, Attorney General  
Martel J. Bundy, Assistant Attorney General

### **BACKGROUND**

You have requested our opinion concerning the ability of the Nebraska Department of Transportation ("NDOT") to use an innovative approach to finance the construction of the Lincoln South Beltway. That project will consist of eight and one-half miles of new four-lane freeway connecting US Highway 77 to Highway 2 thereby creating a bypass south of Lincoln. The project includes five interchanges. NDOT expects to commence construction in early 2020. The anticipated cost is about \$300 million, making it the most expensive highway project ever undertaken by NDOT.

The project can be built in three years. NDOT's cash flow, however, is not sufficient to pay for the entire cost of the project over that period. NDOT's typical approach would be to break the project into smaller parts and build each part as NDOT's cash flow permits. Under that approach, the bypass would take seven to ten years to complete. The smaller parts would be completed at various times but would serve little or no purpose until the entire bypass was completed. The public would have a usable bypass sometime between 2028 and 2030.

NDOT proposes a construction contract that requires completion in three years, but pays the contractor in scheduled payments over a period of seven to ten years. Under that plan, taxpayers would realize the benefits of the new highway as early as 2023. Payments would be made during construction and would continue for about four to seven years after completion. (That is the same payment schedule that would exist if the project were built in smaller parts.) NDOT anticipates a cost savings due to scale if the work is done as one project. Doing the work as one project would also avoid five years of inflation in construction costs.

NDOT plans to pay for the project in part with funds generated under the Build Nebraska Act (Neb. Rev. Stat. §§ 39-2701 to 39-2705 (2016 and Cum. Supp. 2018)), which was passed with the intention of building capital improvement projects such as the Lincoln South Beltway. Additional funding would come from gas tax revenue, which is statutorily dedicated to funding highway construction projects. Neb. Rev. Stat. § 66-4,147 (2018).

Within that context you ask the following question:

Is NDOT allowed, under the Nebraska Constitution, to accelerate construction of a much needed project while making scheduled payment to the construction contractor over an extended time period when the construction contract requires each scheduled payment to be made only upon an express "appropriation" being made by the Legislature?

### ANALYSIS

The Director of the NDOT has broad authority to enter into construction contracts. Neb. Rev. Stat. § 81-701.01 (Cum. Supp. 2018) gives the Director full control of the management, supervision, administration and direction of the Department. Neb. Rev. Stat. § 81-701.02 (Cum. Supp. 2018) grants the Director power to sign and execute all documents and papers, including contracts and agreements for highway construction. State government has authority to enter into contractual agreements as necessary to conduct state business on behalf of the people, and that authority extends to entering into contracts subject only to those limitations or restrictions constitutionally imposed. Op. Att'y Gen. No. 02014 at 3 (April 23, 2002).

There are no statutory limits on the duration of NDOT construction contracts. The statutes do not address whether payments can be made over a time period longer than that required to do the work. Neb. Rev. Stat. § 39-1365 (2016) declares "the highways of the state are of the utmost importance to future development" and refers to accelerated completion of certain highways. Given NDOT's broad authority to enter into contracts, the importance of highways and their accelerated completion, and the lack of any statutory prohibition against the type of contract proposed by NDOT, we conclude that NDOT may contract in the proposed manner unless to do so would violate the Nebraska Constitution.

Neb. Const. art. XIII, § 1, provides, in part:

The state may, to meet casual deficits, or failures in the revenue, contract debts never to exceed in the aggregate one hundred thousand dollars, and no greater indebtedness shall be incurred except for the purpose of repelling invasion, suppressing insurrection, or defending the state in war....

One purpose of this constitutional limitation upon state indebtedness is to prevent the anticipation of revenue by the creation of obligations to be paid from revenue received in future fiscal periods. *Ruge v. State*, 201 Neb. 391, 267 N.W.2d 748 (1978); *State ex rel. Meyer v. Duxbury*, 183 Neb. 302, 160 N.W. 88 (1968). As a result, obligations that are to be paid from revenue to be appropriated by future legislatures are subject to the constitutional debt limitation provision. *State ex rel. Meyer v. Steen*, 183 Neb. 297, 160 N.W.2d 164 (1968).

### **SPECIAL FUND DOCTRINE**

The cost of the project is to be paid with funds generated under the Build Nebraska Act and from gas tax revenue, which is statutorily dedicated to funding highway construction projects. Neb. Rev. Stat. §§ 66-499 through 66-4,106 (2009 and Cum. Supp. 2018). If these gasoline tax revenues constitute a special fund, they are not subject to the constitutional limitation on indebtedness. We conclude, however, that the constitutional debt limitation would likely apply even though funding is limited to gas tax revenue.

*State ex rel. Meyer v. Steen*, 183 Neb. 297, 160 N.W.2d 164 (1968) was an original action to determine the validity of a statute which authorized construction of a building for Game and Parks Commission headquarters to be financed in part from the proceeds of the sale of permits and licenses to hunt, trap, and fish. The attorney general argued that the statute violated the debt limitation in Neb. Const. art. XIII, § 1. The defendants relied upon the "special fund doctrine" and contended that the debt limitation provision of the constitution was not applicable because payments were to be made only from the State Game Fund and not from revenue derived from general taxation. Addressing this claim, the court noted that the Legislature was not restricted from using the fund for other purposes, stating:

The State Game Fund is derived from the sale of permits and licenses to hunt, trap and fish. Under present legislation, the game fund is devoted to the development and protection of wildlife in the state. But the revenue received from the sale of such permits and licenses is subject to the control of the legislature and may be used for the support of the schools or some other legal use. *Wilcox v. Havekost*, 144 Neb. 562, 13 N.W.2d 889. In this respect, the revenue which constitutes the State Game Fund is similar to other revenue collected and received by the state. 183 Neb. at 299, 160 N.W.2d at 166-167.

The court stated that, if the Legislature were free to authorize unlimited debt payable from special funds derived from excise taxes, then the constitutional limitation upon indebtedness would be ineffective. It therefore held the statute to be unconstitutional. *See also State ex rel. Douglas v. Thone*, 204 Neb. 836, 849, 286 N.W.2d 249, 255-256 (1979). ("In this state the special fund doctrine is not applicable to obligations payable from excise taxes or other revenue subject to the control of the Legislature and available for any legal use.")

Funds collected under the Build Nebraska Act and taxes on gasoline are similar to the State Game Fund. The funds are statutorily dedicated to a specific purpose but there is nothing preventing a future legislature from using those funds for a different purpose. In the case of the State Game Fund, the Supreme Court held that "an attempt to authorize the spending of the revenue received from the sale of permits and licenses to hunt, trap and fish far in advance of receipted revenue...is a form of financing which the constitutional provision was intended to prevent." *Steen*, 183 Neb. at 300-301, 160 N.W.2d at 167. We believe the Nebraska Supreme Court is likely to apply that holding to funds generated by the Build Nebraska Act and to other funds generated by taxes on gasoline. In that case there is no "special use" fund and the constitutional limitation on indebtedness applies.

#### **SUBJECT TO APPROPRIATION**

The contract would provide that payments due in future fiscal periods would be due and owing only if the Legislature appropriated funds to make those payments. A "non-appropriation" provision of this nature would not violate the constitutional debt limitation if it does not create a binding legal obligation to pay under the contract beyond the current appropriation period. There are no Nebraska cases directly on point. But, Nebraska case law may provide support for NDOT's plan.

In *Ruge v. State*, 201 Neb. 391, 267 N.W.2d 748 (1978), the Nebraska Supreme Court held that future payments made contractually dependent upon appropriations were not subject to the constitutional debt limitation. In that case the State of Nebraska entered into a lease purchase agreement with the City of Omaha. The agreement included an "appropriation clause" which conditioned payment of the annual rent upon appropriation by the Legislature. The legal liability of the state was limited to rental periods of twelve months or less for which an appropriation had been made. Under the lease, the state had no binding obligation to pay rent beyond the current year. Under those facts the court determined that the agreement did not violate the constitutional limitation on indebtedness. The court noted:

Much of the plaintiff's argument is directed to the fact that the lease agreement between the city and state does not resemble an ordinary commercial lease. Without question the agreement is a device to permit the state to obtain the use of the facility through a system of annual payments. This by itself does not invalidate the agreement. The question is whether the state has assumed a binding obligation which violates the

constitutional provision against indebtedness. 201 Neb. at 394, 267 N.W.2d at 750.

The court concluded the arrangement did not violate the constitutional debt limit, stating:

The liability of the state is limited to rental periods of 12 months or less, for which there has been an appropriation or other available money. In the event there is none, the lease terminates. Since the liability of the state extends for only 1 year at a time there is no binding obligation beyond the rental period for which an appropriation has been made. 201 Neb. at 395, 267 N.W.2d at 751.<sup>1</sup>

Other courts have recognized that “subject to appropriation” or “non-appropriation” language is sufficient to insulate a future payment from a state constitution’s prohibition against debt. See, e.g., *Schulz v. State*, 84 N.Y.2d 231, 616 N.Y.S.2d 343, 639 N.E.2d 1140 (N.Y. 1994); *Dieck v. United School Dist. of Antigo*, 165 Wis.2d 458, 477 N.W.2d 613 (Wis. 1991); *Department of Ecology v. State Finance Committee*, 116 Wash.2d 246, 804 P.2d 1241 (Wash. 1991). In *Burgos v. State*, 222 N.J. 175, 118 A.3d 270 (2015), the Supreme Court of New Jersey addressed its state’s constitutional limitation on debt in the context of payments to the state pension fund. The court acknowledged the need for flexibility in modern financing and took that need into account in interpretation of the debt limitation. The court reduced the analysis to an easily understood principle, stating: “So long as the state’s full faith and credit is not pledged and a legally enforceable financial obligation, above a certain amount and lasting year to year, is not created, without voter approval, no Debt Limitation Clause violation ensues.” *Id.* at 201, 118 A.3d at 286 (citing *Lonegan v. State*, 176 N.J. 2, 819 A.2d 395 (2003)). The court emphasized that, “if a financial obligation is made dependent on securing an appropriation from year to year, then parties are apprised of the element of risk and no constitutional debt limitation violation arises. What matters is not what the financing scheme is called, but rather how it operates.” 222 N.J. at 201, 118 A.3d at 286.<sup>2</sup>

---

<sup>1</sup> The lease agreement included a “liquidated damages provision” which was not made dependent upon a future appropriation. The court invalidated this provision, stating: “This kind of an open-ended promise violates the spirit and purpose of the constitutional limitation against indebtedness, is beyond the power of the state to assume, and is invalid and unenforceable.” *Ruge*, 201 Neb. at 398-399, 267 N.W.2d at 752.

<sup>2</sup> Noting economic realities such as the risk to the state’s credit rating or loss of equity in a financed facility, some courts have found a debt limitation violation despite the use of non-appropriation language, concluding it was not practical or reasonable to believe future funding would not be appropriated. *Winkler v. State School Building Authority*, 189 W. Va. 748, 434 S.E.2d 420 (W. Va. 1993); *State ex rel. Ohio Funds Management Bd. v. Walker*, 55 Ohio St. 3d 1, 561 N.E.2d 927 (Ohio 1990); *Montano v.*

NDOT's proposed contract would make payments in future fiscal periods subject to appropriation by the Legislature. Thus, as in *Ruge*, there would be no binding obligation beyond the period for which an appropriation has been made. Based on *Ruge*, and similar precedent from other jurisdictions, there is a reasonable good faith argument that NDOT's plan is permissible under the Nebraska Constitution.

It must be noted that the contract proposed by NDOT differs from that in *Ruge* in several respects. The payments in *Ruge* were made in the same year that consideration in the form of occupancy was provided. In the event the state did not pay rent in any particular year, the lease was terminated and the building remained the property of the city. Under NDOT's proposed contract, payments will be made in years after which all consideration has been provided and there will be no property to revert to the contractor.<sup>3</sup> Although the Nebraska Supreme Court did not address those distinguishing factors in *Ruge*, it could find those distinctions important when comparing NDOT's plan to a lease purchase agreement. Courts in other states have found those factors to be important. In *Business Computer Rentals v. State Treasurer*, 114 Nev. 63, 953 P.2d 13 (1998), the Nevada Supreme Court based its holding that a lease purchase agreement did not violate the constitutional limitation on indebtedness partially upon the fact that the subject matter of the agreement was fungible equipment susceptible to repossession. In *City of San Diego v. Rider*, 47 Cal. App. 4th 1473, 55 Cal. Rptr. 2d 422 (1996), the holding that a lease purchase agreement did not violate the constitutional prohibition of indebtedness was based, in part, on the fact that each year's payment was for consideration furnished during that year. Indiana courts have held likewise. See *Protsman v. Jefferson-Craig Consolidated School Corp. of Switzerland County*, 231 Indiana 527, 109 N.E.2d 889 (1953).

Further, *Ruge* involved a lease of an office building constructed by the City of Omaha located on city land. In the event the lease were to be terminated due to non-appropriation, the City retained ownership and presumably could use the facility for its own purposes or lease it to another tenant or tenants. NDOT's proposal involves construction of a public highway on land owned by the state. Unlike an office building, a public highway is not property that can be leased or used for a different purpose. A court may be unwilling to accept that, even with a non-appropriation provision, the state has not undertaken an obligation to pay for the project extending beyond the current appropriation period, as it is virtually impossible to see how the state could not fully fund the project.

---

*Gabaldon*, 108 N.M. 94, 766 P.2d 1328 (N.M. 1989). *Ruge*, however, did not address such a claim.

<sup>3</sup> This is also a distinction between NDOT's current process and NDOT's proposed plan. Although projects currently extend over three or four years, payments are made to the contractor during the year that the consideration is furnished. That will not be true under NDOT's proposed plan.

### CONCLUSION

In sum, there are no cases, in Nebraska or elsewhere, that directly address whether the plan proposed by NDOT would violate the state constitutional debt limitation. Courts in other states have held that future payments that are subject to appropriation do not give rise to a binding legal obligation subject to a constitutional limitation on debt. *Ruge* held a non-appropriation clause in a lease did not violate the constitutional debt limit because it created no binding obligation beyond the rental period for which an appropriation was made. The facts in *Ruge*, however, differ from those presented by NDOT's proposal. There are cases from some states that have found a debt limitation violation despite the use of non-appropriation language, concluding it was not practical or reasonable to believe future funding would not be appropriated. If faced with NDOT's proposal, the Nebraska Supreme Court could distinguish the facts from those in *Ruge*. We cannot say with any certainty whether those factual distinctions would result in a different holding. Based on *Ruge*, however, we conclude there is a reasonable good faith argument that NDOT's plan does not violate the state constitutional limit on indebtedness because payments to be made in future fiscal periods would be subject to appropriation by the Legislature.

Very truly yours,

DOUGLAS J. PETERSON  
Attorney General



Martel J. Bundy  
Assistant Attorney General

Approved by:



Attorney General