

TWENTY-NINTH DAY - FEBRUARY 24, 2020

LEGISLATIVE JOURNAL

**ONE HUNDRED SIXTH LEGISLATURE
SECOND SESSION**

TWENTY-NINTH DAY

Legislative Chamber, Lincoln, Nebraska
Monday, February 24, 2020

PRAYER

The prayer was offered by Chaplain Deb Badeer, Grand Lodge at the Preserve and Lincoln Chaplaincy Corps, Lincoln.

ROLL CALL

Pursuant to adjournment, the Legislature met at 9:00 a.m., President Foley presiding.

The roll was called and all members were present except Senators Brewer, Cavanaugh, DeBoer, Friesen, La Grone, Lindstrom, Vargas, and Wishart who were excused until they arrive.

CORRECTIONS FOR THE JOURNAL

The Journal for the twenty-eighth day was approved.

ATTORNEY GENERAL'S OPINION

Opinion 20-001

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

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 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
(Signed) Lynn A. Melson
Assistant Attorney General

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

09-655-30

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 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.

RESOLUTION(S)

Pursuant to Rule 4, Sec. 5(b), LR319 was adopted.

PRESIDENT SIGNED

While the Legislature was in session and capable of transacting business, the President signed the following: LR319.

GENERAL FILE

LEGISLATIVE BILL 790. Senator Slama renewed her amendment, [AM2436](#), found on page 642 and considered on page 680.

The Slama amendment was adopted with 31 ayes, 1 nay, 11 present and not voting, and 6 excused and not voting.

Advanced to Enrollment and Review Initial with 32 ayes, 1 nay, 11 present and not voting, and 5 excused and not voting.

LEGISLATIVE BILL 424. Committee [AM509](#), found on page 705 and considered on pages 1198, 1199, and 1451, First Session, 2019, was renewed.

Senator Hilgers withdrew his amendment, [AM1401](#), found on page 1199 and considered on pages 1207 and 1451, First Session, 2019.

Senator Hilgers withdrew his amendments, [AM1403](#), [AM1404](#), [AM1402](#), and [AM1400](#), found on pages 1210, 1454, and 1455, First Session, 2019.

Senator Quick withdrew his amendment, [AM1513](#), found on page 1427, First Session, 2019.

Senator Quick offered his amendment, [AM2122](#), found on page 401, to the committee amendment.

Pending.

RESOLUTION(S)

LEGISLATIVE RESOLUTION 326. Introduced by Wishart, 27.

WHEREAS, Leonard Mozer was born in Lincoln, Nebraska, in January of 1931 to Max and Mary Mozer; and

WHEREAS, Leonard graduated from Lincoln High School and later from the University of Nebraska where he earned a bachelor's degree in Business Administration and was a member of the Sigma Alpha Mu Fraternity; and

WHEREAS, Leonard spent two years in the United States Army (1951-1953) and was stationed in Germany during the Korean War; and

WHEREAS, Leonard married Lincoln native Reva Gittelman in 1953 at the Lincoln Hotel; and

WHEREAS, in February of 1958, Leonard and Reva opened what was then called Leonard's House of Color in Lincoln, in a building owned by his father who ran a poultry business in the space from the 1920s through the 1940s; and

WHEREAS, Leonard originally sold paint and unfinished furniture and later expanded the business to include wallpaper and self-constructed dollhouses, eventually changing the name to Leonard's Unfinished Furniture; and

WHEREAS, during 62 years of operating a business in downtown Lincoln, Leonard earned a reputation as an honest, helpful, and respectful businessman; and

WHEREAS, Leonard is a long-time member of the Congregation Tifereth Israel, was a board member of the Mount Carmel Cemetery, and is a member of B'Nai B'rith and the Benevolent and Protective Order of Elks; and

WHEREAS, Leonard and Reva have a flourishing family of three proud children and four grandchildren.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE ONE HUNDRED SIXTH LEGISLATURE OF NEBRASKA, SECOND SESSION:

1. That the Legislature recognizes Leonard Mozer for his lifetime of public service to the Lincoln community, including his distinguished 62-year career as the owner of Leonard's Unfinished Furniture.

2. That a copy of this resolution be sent to Leonard Mozer and his family.

Laid over.

COMMITTEE REPORT(S)
Agriculture

LEGISLATIVE BILL 1159. Placed on General File.

(Signed) Steve Halloran, Chairperson

Urban Affairs

LEGISLATIVE BILL 1155. Placed on General File with amendment.

[AM2482](#)

1 1. On page 3, line 29, strike "of" and insert "described in 26
 2 U.S.C. 42(d)(5)(B), as such section existed on".
 3 2. On page 4, strike lines 3 through 9 and insert the following new
 4 subdivisions:
 5 "(c) Owner-occupied housing units that have an after-construction
 6 appraised value of at least one hundred fifty thousand dollars but not
 7 more than two hundred fifty thousand dollars. For purposes of this
 8 subdivision (c) and subdivision (d) of this subsection, housing unit
 9 after-construction appraised value shall be updated annually by the
 10 department based upon the most recent increase or decrease in the
 11 Producer Price Index for all commodities, published by the United States
 12 Department of Labor, Bureau of Labor Statistics;
 13 (d) Owner-occupied housing units for which the cost to substantially
 14 rehabilitate such units exceeds fifty percent of a unit's before-
 15 construction assessed value, and the after-construction appraised value
 16 is at least one hundred fifty thousand dollars but not more than two
 17 hundred fifty thousand dollars;".
 18 3. On page 5, line 7, strike "consolidated plan" and insert "most
 19 recent consolidated plan submitted under 24 C.F.R. part 91, subpart D, as
 20 such subpart existed on January 1, 2020".

(Signed) Justin Wayne, Chairperson

COMMITTEE REPORT(S)
Agriculture

The Agriculture Committee desires to report favorably upon the appointment(s) listed below. The Committee suggests the appointment(s) be confirmed by the Legislature and suggests a record vote.

Beth Smith - Nebraska State Fair Board

Aye: 7. Blood, Brandt, Halloran, Hansen, B., Lathrop, Moser, Slama. Nay: 0. Absent: 1. Chambers. Present and not voting: 0.

(Signed) Steve Halloran, Chairperson

BILLS ON FIRST READING

The following bills were read for the first time by title:

LEGISLATIVE BILL 849A. Introduced by Pansing Brooks, 28.

A BILL FOR AN ACT relating to appropriations; to appropriate funds to aid in carrying out the provisions of Legislative Bill 849, One Hundred Sixth Legislature, Second Session, 2020.

LEGISLATIVE BILL 963A. Introduced by Brewer, 43; Hansen, M., 26; McDonnell, 5.

A BILL FOR AN ACT relating to appropriations; to appropriate funds to aid in carrying out the provisions of Legislative Bill 963, One Hundred Sixth Legislature, Second Session, 2020.

AMENDMENT(S) - Print in Journal

Senator Pansing Brooks filed the following amendment to LB238:
AM2551

1 1. Strike the original sections and insert the following new
2 sections:
3 Section 1. Section 83-970, Revised Statutes Cumulative Supplement,
4 2018, is amended to read:
5 83-970 (1) Besides the Director of Correctional Services and those
6 persons required to be present under the execution protocol, the
7 following persons, and no others, except as provided in section 83-971,
8 may be present at the execution: (a) ~~(1)~~ The member of the clergy in
9 attendance upon the convicted person; (b) ~~(2)~~ no more than three persons
10 selected by the convicted person; (c) ~~(3)~~ no more than three persons
11 representing the victim or victims of the crime; and (d) (4) such other
12 persons, not exceeding six in number, as the director may designate. At
13 least two persons designated by the director shall be professional
14 members of the Nebraska news media.
15 (2) Except as provided in subsection (3) of this section, the
16 Director of Correctional Services and those persons required to be
17 present under the execution protocol:
18 (a) Shall continuously witness the execution process from the moment
19 the convicted person enters the execution chamber until the convicted
20 person is declared dead or the execution is halted; and
21 (b) Shall not authorize or permit any person to obstruct, limit,
22 shield, or otherwise impede the witnessing or viewing of an execution by
23 any person permitted or required to be present at such execution.
24 (3) The person or persons administering or conducting the execution
25 under the execution protocol may, upon request, wear a mask or otherwise
26 conceal their personal identity from the witnesses.
27 Sec. 2. Original section 83-970, Revised Statutes Cumulative
1 Supplement, 2018, is repealed.

GENERAL FILE

LEGISLATIVE BILL 424. The Quick amendment, AM2122, found on page 401 and considered in this day's Journal, to the committee amendment,

was renewed.

The Quick amendment was adopted with 30 ayes, 1 nay, 12 present and not voting, and 6 excused and not voting.

Senator Wayne offered his amendment, [AM2568](#), found on page 701, to the committee amendment.

The Wayne amendment was adopted with 33 ayes, 0 nays, 11 present and not voting, and 5 excused and not voting.

Senator Hilgers offered the following amendment to the committee amendment:

[FA101](#)

Amend AM2122

Strike section 5, 11(b), page 8, lines 27-29.

Pending.

AMENDMENT(S) - Print in Journal

Senator Hilgers filed the following amendment to [LB424](#):

[FA102](#)

Amend AM2122

Strike Section 7(1)(k), and page 11, lines 12-14 and renumber sections accordingly and strike page 15, line 19 at ", for income" through line 21.

UNANIMOUS CONSENT - Add Cointroducer(s)

Unanimous consent to add Senator(s) as cointroducer(s). No objections. So ordered.

Senator McCollister name added to LB283.

Senator M. Hansen name added to LB627.

Senator Kolterman name added to LB1018.

VISITOR(S)

Visitors to the Chamber were Evan Schmeits and Shanna Murphy from Omaha; students from UNMC; a group from the Nebraska AFL-CIO and Nebraska Labor Unity Council from across the state; Chad, Emerson, and Hudson Waldow from Norfolk; and presidents, board members, and students from Southeast, Northeast, Central, Mid-Plains, and Western Nebraska Community Colleges.

The Doctor of the Day was Dr. Lynette Kramer from Albion.

ADJOURNMENT

At 11:49 a.m., on a motion by Senator Halloran, the Legislature adjourned until 9:00 a.m., Tuesday, February 25, 2020.

Patrick J. O'Donnell
Clerk of the Legislature

