FISCAL IMPACT REPORT

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SHORT TITLE Vibrant Communities Act **BILL NUMBER** House Bill 290

ANALYST Carswell

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT*
(dollars in thousands)

Agency/Program	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Capital Outlay Appropriations to Local and Tribal Governments and Political Subdivisions	No fiscal impact	No fiscal impact	See Fiscal Implications	See Fiscal Implications	Recurring	Other state funds
Department of Finance and Administration	No fiscal impact	No fiscal impact	Up to $1,500.0	Up to $1,500.0	Recurring	General Fund
Office of the State Auditor	No fiscal impact	No fiscal impact	Up to $1,000.0	Up to $1,000.0	Recurring	General Fund
Secretary of State	No fiscal impact	No fiscal impact	$50.0	$50.0	Nonrecurring	General Fund
Total	No fiscal impact	No fiscal impact	Up to $1,550.0	Up to $1,550.0	Recurring	General Fund

Parentheses ( ) indicate expenditure decreases.
*Amounts reflect most recent analysis of this legislation.

Relates to House Joint Resolution 11

Sources of Information
LFC Files

Agency Analysis Received From
New Mexico Attorney General (NMAG)
Office of the State Auditor (OSA)
Department of Finance and Administration (DFA)
State Ethics Commission (SEC)
Indian Affairs Department (IAD)
Department of Health (DOH)

SUMMARY

Synopsis of House Bill 290

House Bill 290 (HB290) enacts the Vibrant Communities Act, creates the Vibrant Communities Program within the Department of Finance and Administration (DFA), and provides direction to the department on implementing the program. The act is enabling legislation for House Joint

Resolution 11 (HJR11) , which would repeal and replace the Anti-Donation Clause of the New Mexico Constitution, removing specific exceptions previously approved by voters and replacing them with a broad exception for donations to private entities to accomplish a "public purpose" for the benefit of public health, safety, or welfare.

HB290 defines "public purpose" as providing facilities or services for the benefit of the public health, safety, or welfare, and defines "public purpose project" as a project proposed and performed by a qualifying entity to address a public purpose within the community in which the project would be located. "Qualified entities" are defined in the bill as entities that have been granted federal income tax exemptions under Section 501(c)(3) or Section 501(c)(12) of the U.S. Internal Revenue Code.

HB290 directs DFA to promulgate rules for the Vibrant Communities Program to ensure the protection of public funds and specifies that public assistance pursuant to the act shall be provided subject to legislative appropriation. The bill directs DFA to establish an application process for funds through the program and to provide recommendations to the Legislature for funding proposed projects. The bill specific that legislative appropriations for the program shall be for specific purposes and amount for each public purpose project. DFA would administer contracts consistent with those appropriations. The bill further requires DFA to report annually to the governor, the Legislature, and the Legislative Finance Committee (LFC) on public assistance provided through the program, whether public purpose projects are considered fully funded, services being provided by the projects, and recommended changes to the Vibrant Communities Act to safeguard public funds, if warranted.

The effective date of this bill is contingent on voter approval of the constitutional amendment proposed by HJR11.

FISCAL IMPLICATIONS

The Vibrant Communities Act could create a significant new source of demand for capital outlay appropriations by removing an existing barrier to making capital appropriations directly to nonprofits for privately owned facilities. However, it would not impact revenues to the capital program—which are determined by annual severance tax revenues and may be supplemented by general funds at the Legislature's discretion—and it is unlikely to increase overall funding available for capital outlay. The source of potential appropriations to private entities is likely to be the discretionary capital outlay funds individual legislators and the governor currently appropriate mostly to local and tribal governments and political subdivisions. Thus, any increase in capital appropriations to private entities resulting from HJR11 and HB290 would proportionally decrease capital appropriations to local and tribal governments and political subdivisions.

Capital appropriations are already made to benefit non-profits operating out of publicly owned facilities through a public fiscal agent. While it is difficult to precisely identify the portion of current capital appropriations used in this manner, DFA and LFC estimate it is no more than 5 percent of local capital appropriations, or up to $26 million annually based on recent local capital spending. This fiscal analysis assumes the changes under HJR11 and HB290 would result in, at most, a doubling of annual capital appropriations to nonprofits, resulting in a proportional decrease to local public entities that would otherwise receive those dollars. This analysis assumes the impact to the capital outlay program would begin in FY28, at the earliest.

The operating budget impacts to agencies impacted administratively by HJR11 and its enabling legislation are estimated based on analysis submitted by the agencies.

SIGNIFICANT ISSUES

Analysis submitted by the Attorney General's office explains the legal implications of HJR11 and its companion enabling legislation, HB290:

> As currently written, unless there is an applicable exception, the Anti-Donation Clause limits donations to the exchange of goods, which means that such funds are tied to a set exchange of goods or services for the appropriations or funds of the state. Accordingly, the anti-donation clause currently does not prohibit all donations of public funds. The specific exceptions currently carved out would likely be classified as "public purposes" under HJR11's proposed language.
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> Under the current law, government agencies may still (i) expend appropriated funds on service contracts with nonprofits; and (ii) expend capital outlay appropriation for government buildings and lease those structures to nonprofits on favorable terms.
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> As proposed, HJR11, in concert with HB290, would eliminate this current legal framework and instead permit the transfer of public funds to private nonprofits so long as the transfers comply with the "Vibrant Communities Program" established by HB290. HB290 provides for an administrative program run by the DFA with "public purpose projects" funded by the Legislature.
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> Although HB290 attempts to centralize government donations under DFA and the Legislature, the impact of this framework on other political subdivisions of the state, such as counties and municipalities, is unclear. HB290 is silent as to requests for donations from private entities that are made directly to political subdivisions, meaning there is neither an express authorization nor an express prohibition applicable to such direct requests.
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> This has implications for municipalities and counties because of the Home Rule Amendment (Section 6 of Article X of the New Mexico Constitution). For non-home-rule counties and cities, this silence would likely operate as a prohibition, because non-home-rule counties and cities typically require an express grant of authority from the Legislature to act. In contrast, home-rule counties and cities would presumably be able to receive such requests and make donations because their authority exists unless prohibited by the Legislature.
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> Home-rule counties and municipalities receiving donation requests would be in the position of having to interpret the broad meaning of the terms "public purpose" and "public health, safety, or welfare." It is very likely that there would be pressure to include the activities of some groups and exclude others. For example, a frequent request that tests the current anti-donation clause is the free use of public facilities. Under a new HJR11/HB290 framework, would a boy's little league baseball organization meet the definition of a public purpose because it promotes public health, safety, or welfare? What about the Girl and Boy scouts? What about a religious-based drug rehabilitation group? The possibilities abound and without more legislative guidance, home-rule counties and

cities would likely make different determinations of "public purpose" based on local preferences, requiring the courts to be called upon to delineate what is and what is not a public purpose.

For the state, HRJ11 could put pressure on ethics and disclosure laws in New Mexico. Unconstrained subsidies could pressure state laws limiting gifts, quid pro quo, conflicts of interest, and require financial disclosures. Few laws exist at the local level to combat these issues. Additionally, there could be risks of governments subsidizing nonprofits at scale.

Subsidies to nonprofits (for land, capital expenses, operating expenses) could allow government bodies to use nonprofits to bypass the state laws regarding disclosure, procurement, and conflicts of interest.

Lastly, HJR11 would propose repealing Section 31 of Article IV of the New Mexico Constitution, subject to a vote of the people as in the previous section. This repeal would be required for the "Vibrant Communities Program" proposed by HB290, because Section 31 of Article IV requires the Legislature to appropriate to entities "under the absolute control of the state." The state Supreme Court has ruled in *Moses v. Ruszkowski*, 2019-NMSC-003, that Section 31 of Article IV imposes limits on the Legislature's authority to appropriate money. The amendment would remove those limits permitting the distribution of funds to private entities contemplated by HB290. This potentially opens a new avenue for fraud and corruption.

The State Ethics Commissions adds that, if amended as proposed in HJR11, the gift clause of the constitution would "operate less as a constitutional constraint on subsidies of public funds to private organizations, and more as a general authorization for the Legislature to allow or require state agencies, counties, municipalities, and school districts to donate public funds or property" to private entities. Additionally, the Ethics Commission notes the broad exemption in HJR11 interferes with voters' ability to approve each specific permissible category of exemption from the anti-donation clause, as has occurred to date.

ADMINISTRATIVE IMPLICATIONS

DFA anticipates a significant increase in its administrative workload to carry out its duties under HB290. The agency states its Infrastructure Planning and Development Division, Administrative Services Division, Financial Control Division, and the Board of Finance would all be significantly impacted. The department states a new division could be necessary to stand up the Vibrant Communities Program: however, it is likely positions could be added to an existing division, such as the Local Government or Infrastructure divisions, to administer the program. DFA's analysis details the cost and work hours required in each impacted division in its analysis, totaling roughly $3 million per year.

Additionally, DFA notes, "Utilizing tax-exempt bond proceeds to fund private organizations' projects creates risk for the state that the bonds' tax-exempt status may be forfeited." Tax-exempt bonds are the typical source of funding for capital appropriations. The Board of Finance may instead need to explore using taxable bonds for projects authorized through the Vibrant Communities Program.

The Office of the State Auditor (OSA) states it opposes HJR11 and HB290, which it says would trigger a provision of the Audit Act that could significantly expand the scope of the State Auditor's work. Charitable organizations receiving state appropriations are included in the definition of agencies subject to the Audit Act, according to OSA, but the agency has not previously exercised authority over these entities due to the Anti-Donation Clause.

The State Ethics Commission (SEC) notes HB290 subjects the public purpose entities and their employees to the Governmental Conduct Act, which could cause some administrative and fiscal impact to SEC by expanding the individuals under its jurisdiction. However, the commission does not anticipate a significant impact.

PERFORMANCE IMPLICATIONS

DFA notes the broad definition of public purpose proposed in the bill could make it difficult to evaluate the value of proposed projects and to ensure the public purpose is fulfilled:

> While approve public projects may be well-intended, they may ultimately not produce any benefit to the public. If no public benefit was achieved, how would DFA ensure the project complies with HJR 11's proposed changes to (the constitution)? HB290 does not identify or provide any process for evaluation of public benefit from a public purpose project or set a minimum public benefit a project must meet to qualify for (the proposed constitutional exemption).

TECHNICAL ISSUES

The Attorney General's Office notes the bill's definition of "qualifying entity" may include religious organizations, which may qualify for 501(c)(3) tax exemptions. The office states, "Under HB290 the Legislature could give support to a religious organization potentially raising separation of church and state questions under the First Amendment of the U.S. Constitution or Section 11 of Article II of the New Mexico Constitution."

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB290 relates to HJR11, a proposed constitutional amendment that must be approved by voters for HB290 to become effective.

CC/hg/sgs