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FISCAL IMPACT REPORT

SPONSOR Ortiz y Pino **ORIGINAL DATE** 03/09/21
LAST UPDATED _____ **HB** _____
SHORT TITLE Nonprofit Exemption to Anti-Donation, CA **SJR** 24
ANALYST Gaussoin

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total			\$150.0- \$200.0	\$150.0- \$200.0	Nonrecurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to Senate Bills 393 and SB174, House Joint Resolutions 7, 9 and 11, and Senate Joint Resolution 9.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General (NMAG)

Department of Finance and Administration (DFA)

Department of Transportation (NMDOT)

SUMMARY

Synopsis of Senate Joint Resolution

Senate Joint Resolution 24 would ask voters to add language to Article 9, Section 14, of the New Mexico Constitution – the anti-donation clause – to allow the state or local governments to provide real estate, equipment, or money to a nonprofit organization or cooperative that provides goods or services to the public on behalf of the state or a county or a municipality. The resolution requires the Legislature to adopt enabling legislation that specifies any specific donation must be approved by the county or municipal government involved and by state law if a state donation.

If approved by the Legislature, voters would consider the amendment at the next general election or a special election called specifically to consider the question.

FISCAL IMPLICATIONS

Under Section 1-16-4 NMSA 1978 and the New Mexico constitution, the Secretary of State is

required to print samples of the text of each constitutional amendment, in both Spanish and English, in an amount equal to 10 percent of the registered voters in the state. The Secretary of State is also required to publish them once a week for four weeks preceding the election in newspapers in every county in the state. The estimated cost per constitutional amendment is \$150 thousand to \$200 thousand depending on the size and number of ballots and if additional ballot stations are needed.

The Department of Finance and Administration notes the constitutional amendment, if approved by voters, could increase the demand for capital outlay by making those funds more accessible:

As noted in the department's FIR for SB393 [allowing nonprofit organizations to qualify for community development assistance], allowing non-profits to receive capital funding from the state will likely reduce the amount of funding available for other statewide projects. ... However, it should be noted ... SJR24 may be construed to allow non-profit and cooperative corporations to receive public funds more broadly "to advance community well-being."

Viewed together, SJR24 and SB393 will most likely result in an increase in requests for funding assistance related to community well-being projects. The Department of Finance and Administration and other state agencies engaged in the review and oversight of such projects will likely need additional staff to meet the increased demand.

DFA does not quantify its need for additional staff and that amount is not included in the estimate impact.

SIGNIFICANT ISSUES

Exceptions to the anti-donation clause are not uncommon. Article 9, Section 14, contains exceptions for a scholarship program and a student-loan-for-service program, and the Department of Transportation (NMDOT) notes existing exceptions for the Local Economic Development Act and affordable housing, both of which required enabling legislation.

DFA explains:

Permitting non-profit and cooperative corporations to receive public funds may seem like a significant departure from the strict text of Article IX, Section 14, which otherwise prohibits public aid to private enterprise. However, the requirement that goods and services must be provided pursuant to a contract between the public body and non-profit or cooperative corporation reflects the trend in New Mexico case law, in which courts have generally determined that if the state, county or municipality enters into a contract, for valid consideration, with an individual or public or private entity to provide goods or services, then there is no violation of the Anti-Donation Clause. See *Hotels of Distinction W. Inc. v. City of Albuquerque*, 1988-NMSC-047; *State ex rel. State Park & Recreation Comm'n v. New Mexico State Authority*, 1966-NMSC-033; *Village of Deming v. Hosdreg Co.*, 1956-NMSC-111.

In addition, the term "community well-being" is akin to the exception that already exists under in Article IX, Section 14, Subsection A, providing that: "Nothing in [Article IX, Section 14] prohibits the state or any county or municipality from making the provision for the care and maintenance of sick and indigent persons." For example, if we look to the

language proposed in SB393 for guidance, a “community well-being and capital development project” is defined as the provision of assistance to a qualifying entity that: “serves New Mexico’s sick and indigent residents and that promotes health, self-sufficiency and community and economic development, thereby strengthening the resources of the community...” SB393, Section 2.

However, DFA notes concerns with the broad scope of the proposed amendment in SJR24:

The concept of community well-being is undoubtedly broader in scope than the exception for the care of sick and indigent persons already enshrined in the New Mexico Constitution, and thus SJR24 may invite confusion and/or litigation should disputes arise as to whether a project will serve the purpose of “community well-being.” Mindful of these concerns, SJR24 does not appear to present any issues regarding constitutional validity per se but, without additional guidance beyond SB393, it seems like the Legislature will leave it up to the courts to determine what constitutes community well-being for the purposes of this exception.

NMDOT also raises concerns with the broad language in SJR24 and suggests that issue be addressed in the enabling legislation:

SJR24 contains a number of terms and phrases which would need to be defined or restricted in the enabling legislation. How those terms and phrases would be defined will determine the impact the proposed constitutional amendment would have on the NMDOT. For example, the proposed amendment would allow NMDOT to provide certain assistance if the assistance would “advance community well-being.” The proposed amendment fails to provide any means by which to either measure or determine whether the assistance would advance community well-being. Further, the proposed amendment would allow the assistance to either a nonprofit corporation or cooperative corporation that “provides goods or services to the public on behalf of” the entity providing the assistance. Goods and services are very expansive terms. A limitation on the types of goods and services that can be provided should be established. The goods or services also need to be provided on “behalf of” ... “the state.” This phrase seems to suggest that the goods or services are those types that the specific entity providing the assistance normally provides to the public.

Similarly, the Attorney General’s office indicates the proposed amendment or its enabling legislation should restrict donations to those nonprofit organizations or cooperatives in full compliance with all laws.

ADMINISTRATIVE IMPLICATIONS

From DFA: “The Department of Finance and Administration and other state agencies engaged in the review and oversight of such projects will likely need additional staff to meet the increased demand for public funding for community well-being related projects.”

From NMDOT: “If enacted, and dependent on the contents of the enabling legislation, the NMDOT will be requested to enter into certain transactions or relationships it previously declined to enter into due to Anti-Donation concerns.”

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

SJR24 relates to SB393 Vibrant Communities Act, which would allow nonprofit organizations to

qualify for community development funds; HJR7 and HJR11, which would ask voters to approve a constitutional amendment allowing the use of public funds for private schools; HJR9, which would ask voters to approve an exception to the anti-donation clause to allow the use of public funds for power, Internet, water, and other service hookups for private residences; and SJR9, which would ask voters to repeal the Anti-Donation Clause.

DFA says SJR24 also relates to SB174, which clarifies the Legislative Council Services must verify if a state agency, county, or municipality has accepted the role as fiscal agent for a capital outlay request submitted by a nongovernmental entity.

Legislators this session have proposed 33 constitutional amendments.

TECHNICAL ISSUES

NMAG suggests adding language to page 6, line 11, that reads: “...between the nonprofit corporation or cooperative corporation, who must be fully compliant with all laws, and the state or a county or municipality.”

OTHER SUBSTANTIVE ISSUES

DFA notes nongovernment agencies already have a route to access public funds, although it might not be as efficient as direct access and is often fraught with constitutional concerns:

Non-profits and other organizations may be eligible to receive public funds in accordance with Article IX, Section 14, of the New Mexico Constitution through a contract with valid consideration or other valid agreement where funds are appropriated to a public entity and the public entity acts as fiscal agent. However, Anti-Donation Clause concerns under Article IX, Section 14 may nonetheless restrict the efficiency by which public funds can be utilized for their authorizing purpose. By enshrining as an exception to the Anti-Donation Clause the use of public assistance to be provided to non-profit and cooperative corporations for community well-being, the Legislature may relieve some of these concerns and thus allow for public funds to be expended more broadly and efficiently to address public needs pursuant to a contract with a non-profit or cooperative corporation.

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