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FISCAL IMPACT REPORT

SPONSOR Cote **ORIGINAL DATE** 02/03/14
LAST UPDATED 02/03/14 **HJR** 1

SHORT TITLE Local Government Funds for Private Use , CA **SB** _____

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY14	FY15	FY16	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		>\$46.0		>\$46.0	Nonrecurring	Election Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Attorney General's Office (AGO)
 Department of Finance and Administration (DFA)
 Secretary of State (SOS)
 New Mexico Municipal League (NMML)

SUMMARY

Synopsis of Bill

Senate Joint Resolution 1 proposes to amend the state constitution to add a new exception to Article IX, Section 14, which currently bars the state and each of its counties, school districts and municipalities from lending or pledging its credit or making a donation or providing aid to any private person, association or corporation (the "Antidonation Clause"). The new exception authorizes counties and municipalities to expend public monies and resources on a project that may benefit a private entity in order to protect the public's health, safety and welfare, subject to these three conditions:

- The funding for the project be authorized and presently available for immediate expenditure;
- The project be approved by a unanimous vote of all the members of the local government's governing body; and

House Joint Resolution 1 – Page 2

- The project must further a public purpose that is designed to enhance the quality of life of the residents of the county or municipality.

This resolution is to be submitted for approval by the people in the next general election (this coming November).

FISCAL IMPLICATIONS

Under Section 1-16-13 NMSA 1978 and the NM constitution, the SOS is required to print samples of the text of each constitutional amendment, in both Spanish and English, in an amount equal to ten percent of the registered voters in the state. The SOS is also required to publish them once a week for four weeks preceding the election in newspapers in every county in the state. In 2012, the cost for the 2012 General Election ballots was \$46,000 per constitutional amendment. However, if the ballot size is greater than one page, front and back, it would increase the cost of conducting the general election. In addition to the cost of the ballot, there will be added time for processing voters to vote and would mean additional ballot printing systems would be required to avoid having lines at voting convenience centers.

SIGNIFICANT ISSUES

The exception to the Antidonation Clause contained in HJR 1 would be the seventh exception to the state constitutional ban on using public money to benefit private persons or entities. Existing exceptions allow for care of and maintenance to sick or indigent persons; two veterans' scholarship programs; loans to students of medical and other healing arts in exchange for practice obligations within the state pursuant to implementing legislation; local economic development projects pursuant to implementing legislation; and affordable housing projects pursuant to implementing legislation.

The enabling legislation for healthcare student loans, affordable housing and local economic development projects define the acceptable uses of the public monies being expended and set out detailed qualifying criteria and requirements and procedures that must be followed. As to loans for service, see the Medical Student Loan for Service Act, Sections 21-22-1 through 10, NMSA 1978; Osteopathic Medical Student Loan for Service Act, Sections 21-22A-1 through 10, NMSA 1978; Nursing Student Loan for Service Act Sections 21-22B-1 through 10, NMSA 1978; and Allied Health Student Loan for Service Act, Sections 21-22C-1 through 10, NMSA 1978. As to affordable housing, see the Affordable Housing Act, Sections 6-27-1 through 8, NMSA 1978. As to local economic development projects, see the Local Economic Development Act, Sections 5-10-1 through 13, NMSA1978.

Perhaps of greater note when comparing these earlier exceptions to that proposed in HJR 1 is the constitutional language of the affordable housing and local economic development exceptions which requires the implementing legislation for each ensure that the public benefit that is the basis for each project is achieved. See Section 1(D) and (F)(3). In compliance with those requirements, the enabling legislation for each includes provisions for recouping the public body's expenditures, including investment in assets acquired or created as a result, in the event of a project's failure or other circumstances negating the benefits to the public interest being served. Enforcement and recovery mechanisms are addressed in the Affordable Housing Act in section 6-27-8(B) (4),(5) and (6) and in the Local Economic Development Act at section 5-10-6(B)(6), (10) and (11).

House Joint Resolution 1 – Page 3

In contrast, the language of the proposed exception contains only general language —“to protect the public’s health, safety and welfare,” and “further a public purpose that is designed to enhance the quality of life of the residents”—without requiring any implementing legislation or further guidance to help define what projects might qualify and what might not. Additionally, there are no provisions requiring the protection of public funds expended in the event a project is not completed, is not used as intended, or encounters any other problems that are contrary to the public purpose it was designed to enhance. Projects to be funded with municipal and county funding may be able to sidestep the requirements of AHA or LEDA by proceeding under this new exception.

Similarly, DFA comments that the need for and goal of HJR1 is unclear. Counties and municipalities are already able to provide assistance to the sick or indigent (N.M. Const., Art. IX, Section 14(A)), to new and expanding businesses (N.M. Const., Art. IX, Section 14(D)), and for affordable housing (N.M. Const., Art. IX, Section 14(E)-(F)).

In addition, DFA advises, the Antidonation Clause does not prohibit a county or municipality from providing services to its citizens, either itself or through contractors. For example, municipalities and counties (pursuant to Section 4-37-1 NMSA 1978) are already authorized to provide:

- * museums (Section 3-18-15 NMSA 1978);
 - * libraries (Section 3-18-14 NMSA 1978);
 - * parks (Section 3-18-18 NMSA 1978);
 - * recreational centers, zoos, and other public recreational purposes (Section 5-4-2 NMSA 1978);
- and
- * municipal airports (Chapter 3, Article 39 NMSA 1978).

Moreover, if enacted, DFA questions what is left of the Antidonation Clause, since almost any undertaking could somehow be justified as increasing the "quality of life of the residents of the county or municipality." As a result, as to projects funded with municipal and county monies, the exception may end up swallowing the rule.

Further, as AGO comments, the requirement that the project be “designed to enhance the quality of life” of residents is different than the earlier-stated requirement that the project “protect the public’s health, safety or welfare”. Does a project need to meet both of these criteria? Is the second subsumed in the first? Or is it sufficient to enhance the quality of life in a manner that does not protect public health, safety and welfare? And must a local government specify what exactly is being protected? And enhanced? Should those determinations be required to be in writing?

Additionally, while stating its support for expansion of local authority to make determinations as to the use of local funds and resources, NMML expresses its concern that the language may allow for expenditure of public funds or resources for purposes that are not intended or envisioned at this time. It believes that the language may need to be narrowed to accomplish the sponsor’s intent.

Finally, NMML calls attention to the language of the proposed amendment requiring a unanimous vote of “all the members **elected** to the governing body” in order to expend public funds or resources. It notes that from time to time an elected member of the governing body may

House Joint Resolution 1 – Page 4

resign for a variety of reasons. Additionally, in commissioner/manager forms of government there is a potential that a member or members of the governing body could be subject to recall. In the event of a vacancy on a governing body, the governing body has the option of appointing a person to fill the vacancy until the next regularly scheduled election. In the event of an appointment, the person filling the vacancy may not be recognized as “elected”.

PERFORMANCE IMPLICATIONS

DFA suggests that, if approved by the voters, counties and municipalities may be inundated with requests for public assistance to "enhance the quality of life of the residents of the county or municipality." It advises that counties and municipalities would do well to establish funding priorities and limitations as well as a process for handling such requests. HJR1, however, does not require them to do so.

OTHER SUBSTANTIVE ISSUES

To the extent that the provisions of HJR 1 may be read to authorize any form of indebtedness by a municipality or county, AGO calls attention to Article IX, Sections 10 and 12 of New Mexico’s Constitution, which impose constitutional barriers for such spending. Contracting counties and municipalities should also be cognizant of any contract requiring the public body to indemnify a contractor for a project funded under this provision as violating Article IX, Sections 10 and/or 12 of New Mexico’s Constitution. See 2000 Op. Att’y Gen. No. 00-04 (“Article IX, Section 12 and the similar constitutional debt restrictions for the state and other local governments have been judicially interpreted to preclude a government from entering into an agreement subjecting it to contingent liability, the amount of which is uncertain at the time of the agreement.”).

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Municipal and county monies would continue to generally be precluded from making donations to private persons and entities unless a service or project qualifies under the AHA, LEDA or other existing constitutional exceptions.

AMENDMENTS

NMML recommends, due to situations in which a member to the governing board may be appointed, the word “elected” be deleted on page 6 at line 14.

MD/ds