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Steve Hill, Director
Governor's Office of Economic Development and
The Nevada Commission on Economic Development
555 East Washington Street, Suite 5400
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Dear Mr. Hill:

You have requested an opinion from the Office of the Attorney General regarding whether the administration of the Catalyst Fund proposed by the Governor's Office of Economic Development (GOED) in Draft Regulation No. 2 (Draft R02) would violate the provision of the Nevada Constitution that prohibits the State from providing a gift or loan of public funds to private companies.

BACKGROUND

Act of June 17, 2011, ch. 507, § 16, 2011 Nev. Stat. 3425 (A.B. 449), which passed during the 2011 Legislative Session, created a Catalyst Fund to be administered by the GOED effective July 1, 2012.¹ See A.B. 449, §§ 16 & 17. The Catalyst Fund holds money that is intended to be distributed within the State to promote the economic development of Nevada. A.B. 449 directs the Executive Director of the GOED to

¹ Effective July 1, 2011 through July 1, 2012, the Commission on Economic Development has authority to administer the Catalyst Fund. A.B. 449, § 9. A.B. 449 created the Governor's Office of Economic Development as the successor agency to the Commission on Economic Development. For ease of reading, this Opinion refers to the Governor's Office of Economic Development when referring to the administration of the Catalyst Fund and provides citations to A.B. 449 related to the Governor's Office of Economic Development. Section 9 of A.B. 449 generally refers to the authority of the Commission on Economic Development with respect to the administration of the Catalyst Fund prior to July 1, 2012.

establish procedures for applying for a grant or loan from the Catalyst Fund. A.B. 449, § 17. The Executive Director of the GOED has proposed regulations under which the Catalyst Fund money would be disbursed by the State to regional development authorities, pursuant to agreements between the GOED and the regional development authorities. A.B. 449, § 17(2), (4) & (6); Draft R02 (Draft R02), § A.4. The regional development authorities would in turn disburse these funds to private companies to support economic development in Nevada. A.B. 449, §§ 17(5) & (6)(a); Draft R02, § A.4.a.

QUESTION

Does the proposed administration of the Catalyst Fund by the Executive Director of the GOED violate NEV. CONST. art. 8, §§ 9 or 10 where:

- a. The Executive Director of the GOED will review and approve applications from regional development authorities for grants or loans to be disbursed by the regional development authorities to companies in accordance with development plans specified in the applications;
- b. Companies that fail to use grants or loans received from regional development authorities in accordance with the terms of the agreements between the regional development authorities and the Executive Director must repay the grant or loan to the GOED;
- c. Companies that fail to use grants or loans received from regional development authorities in accordance with the terms of the agreements between the regional development authorities and the companies must repay the grant or loan to the regional development authority.

ANALYSIS

The Nevada Constitution prohibits the State from providing a gift or loan of public funds and credit to private companies if the gift or loan is not made for a public purpose. *Lawrence v. Clark County*, 127 Nev.____, 254 P.3d 606, 612 (Adv. Op. 32, July 7, 2011) Article 8, § 9 provides as follows: "The State shall not donate or loan money, or its credit, subscribe to or be, interested in the Stock of any company, association, or corporation, except corporations formed for educational or charitable purposes." NEV. CONST. art. 8, § 9.

Although the Constitution prohibits the State from donating public funds to companies, associations, or corporations if not made for a public purpose, it does not prohibit a local government from doing so. *Gibson v. Mason*, 5 Nev. 283, 301 (1869). Article 8, § 10 reads as follows: "No county, city, town, or other municipal corporation

shall become a stockholder in any joint stock company, corporation or association whatever; or loan its credit in aid of any such company, corporation or association, except railroad corporations, companies, or associations." NEV. CONST. art. 8, § 10. Importantly, the prohibition against donating money found in § 9 is absent from § 10. Thus, the Nevada Constitution permits local governments to donate money to private companies even if not for a public purpose. *Gibson v. Mason*, 5 Nev. at 301.

Under A.B. 449 and Draft R02, the State, through the GOED, will disburse Catalyst Fund money to regional development authorities pursuant to agreements between the GOED and the regional development authorities. A.B. 449, § 17(2), (4) & (6)(a); Draft R02, § A.4. A.B. 449 and Draft R02 instruct that for a regional development authority to apply for Catalyst Fund money, it must be "a local government or composed solely of two or more local governmental entities; or a private nonprofit regional development authority acting in partnership with a regional development authority, which is a local government or composed solely of two or more local governments."² A.B. 449, § 17(2)(a)(b); Draft R02, § A.1. Therefore, the State's disbursement of Catalyst Fund money to local governments, rather than to companies, associations or corporations, is not constitutionally prohibited.

According to A.B. 449 and Draft R02, regional development authorities will then disburse Catalyst Fund money to "businesses seeking to create or expand in this State or relocate to this State," pursuant to agreements between the regional development authorities and the companies to which the Catalyst Fund money is disbursed. A.B. 449, §§17(5) & (6)(a); see also Draft R02, § A.4.a. A.B. 449 and Draft R02 dictate that the Executive Director will review and approve applications from regional development authorities that will include details regarding how the regional development authorities will disburse the Catalyst Fund money to companies. See A.B. 449, § 17(1)(a) & 17(4); Draft R02, § A.2. In determining whether to approve an application, the Executive Director will consider factors such as "[p]rojected creation of jobs with wages at or above the average wage for the relevant occupations in the county . . .," "projected capital investment . . .," "project relevance to sectors and clusters targeted by the State Plan for Economic Development . . .," "return-on-investment in job creation, wage levels and capital investment . . .," and "the applicant's plan for distributing funds. . . ." Draft R02, § A.2; see also A.B. 449, § 17(1)(a). Although the Executive Director will be informed about how the regional development authorities will disburse the Catalyst Fund money based on review and approval of the Catalyst Fund applications, there is no disbursement of the Catalyst Fund money directly from the State to the companies and therefore no violation of the Nevada Constitution.

² Local government is defined in Draft R02 as "any city or county," or "[a]ny entity or agency that is directly or indirectly controlled by any city or county;" and "[a]ny entity or agency that is created by joint action or any interlocal or cooperative agreement of two or more cities or counties, or any combination thereof."

Moreover, even if A.B. 449 and Draft R02 instructed the State, instead of regional development authorities, to disburse the Catalyst Fund money to companies, no constitutional violation would occur because the administration of the Catalyst Fund serves a legitimate public purpose and does not require the State to guarantee the debt of another. This Office has recognized that NEV. CONST. art. 8, § 9 must “be construed in light of the specific mischief [it was] intended to prevent, not be construed to hinder the government from carrying out its essential function to secure the health and welfare of its citizens.” Op. Nev. Att’y Gen. No. 06 (May 10, 1995). In that Opinion, the Attorney General examined the decision in *State ex rel. Brennan v. Bowman*, 89 Nev. 330, 512 P.2d 1321 (1973), which involved a challenge to a County Economic Development Revenue Bond Law on grounds, among others, that the law permitted public funds to be spent for private purposes and violated NEV. CONST. art. 8, § 9. The Court concluded that although the law benefitted businesses that received the lower cost financing provided under the law, the law was not unconstitutional, in part, because the law had the public purpose “to encourage industry to either locate or remain in this State and, thereby, aid in relieving unemployment and maintaining a stable economy.” *Id.* at 333. The Court also found that the law specifically provided that the bond law “forbids pecuniary liability of the County, or a charge against its general credit or taxing powers.” *Id.* at 333.

Applying these principles to the Catalyst Fund, it is important to note that, although companies that ultimately receive Catalyst Fund money will benefit, the benefit to the State in the form of encouraging targeted industries to remain in or relocate to the State and, thereby, relieving unemployment and promoting a stable economy, serves a proper public purpose. Further, because the Catalyst Fund contemplates donating funds instead of making loans, debt liability to the State is not an issue. Thus, in addition to the fact that the State is not directly disbursing Catalyst Fund money to companies, the Catalyst Fund’s public purpose and absence of potential debt liability to the State support a finding of constitutionality.

Further, constitutionality is not affected by the fact that companies that fail to use grants or loans received from regional development authorities in accordance with the terms of the agreements between the regional development authorities and the Executive Director must repay the grant or loan to the GOED. A.B. 449 and Draft R02 dictate that a provision must be included in the contract between the GOED and the regional development authority providing that in the event the Catalyst Fund money is not used in accordance with the agreement between the GOED and the regional development authority, the company that receives the Catalyst Fund money must return the money to the GOED. A.B. 449, § 17(6)(a); Draft R02, § A.4.b. Nothing in the Nevada Constitution prohibits the State from contracting to protect its resources. In fact, the Nevada Constitution specifically permits the State to contract as necessary to

preserve physical properties within the boundaries of the State, including contracting public debts in excess of the constitutional debt ceiling. NEV. CONST. art. 9, § 3; see *Marlette Lake Co. v. Sawyer*, 79 Nev. 334, 338, 383 P.2d 369, 371 (Nev. 1963). Although physical property is not at issue here, by analogy, it is logical that the State is free to contract to protect other state property, particularly when, as here, the debt ceiling is not at issue. Accordingly, no constitutional violation occurs where the State contracts to reclaim Catalyst Fund money in the event that money is not used in accordance with the agreement between it and a regional development authority.

Finally, this Office need not provide an opinion with respect to the question of whether constitutionality is affected where, in the event the Catalyst Fund money is not used in accordance with the agreement between the regional development authority and a company that received the Catalyst Fund money, the company must repay the money to the regional development authority. Draft R02 does not provide for administration of the Catalyst Fund as stated in the question. Rather, Draft R02 speaks only to a breach of the agreement between the GOED and the regional development authority, in which case the money must be returned to the GOED. As discussed above, contractual reversion of the Catalyst Fund money to the State does not violate NEV. CONST. art. 8, § 9, and is consistent with NEV. CONST. art. 9, § 3. Because Draft R02 does not prescribe procedures based on a breach of an agreement between the regional development authority and a company that received the Catalyst Fund money as described by subpart c of the question presented to this Office, this Office need not provide an opinion on that issue.

CONCLUSION

The Nevada Constitution does not prohibit the State from disbursing Catalyst Fund money to regional development authorities that by definition must be local governments, or prohibit local governments from disbursing Catalyst Fund money to companies. Therefore, the opinion of this Office is that the administration of the Catalyst Fund as outlined in Draft R02 is constitutional. While the State, through the GOED, will review and approve applications from regional development authorities that will include detailed information about how the local governments will disburse Catalyst Fund money, no constitutional violation exists because the State is not disbursing the money to the companies. In addition, the public purpose of the Catalyst Fund supports constitutionality even if direct disbursements by the State were contemplated.

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Finally, because Draft R02 instructs that any repayment of Catalyst Fund money to the GOED by the receiving company would be pursuant to contractual obligations contained in an agreement between the GOED and the regional development authority, no constitutional violation exists.

Sincerely,

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