| LFC Requester: | Cally Carswell |
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# AGENCY BILL ANALYSIS - 2025 REGULAR SESSION

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## SECTION I: GENERAL INFORMATION

***{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}***

**Date Prepared**: *February11, 2025* *Check all that apply:*
**Bill Number:** *HB 290* Original *X* Correction __
Amendment __ Substitute __

**Sponsor:** Representatives Romero, Chandler and Roybal Caballero
**Short Title:** Vibrant Communities Act

**Agency Name and Code Number:** State Ethics Commission 410
**Person Writing** Rebecca Branch
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## SECTION II: FISCAL IMPACT

### APPROPRIATION (dollars in thousands)

| Appropriation | | Recurring or Nonrecurring | Fund Affected |
|---|---|---|---|
| **FY25** | **FY26** | | |
| | | | |
| | | | |

(Parenthesis ( ) indicate expenditure decreases)

### REVENUE (dollars in thousands)

| Estimated Revenue | | | Recurring or Nonrecurring | Fund Affected |
|---|---|---|---|---|
| **FY25** | **FY26** | **FY27** | | |
| | | | | |
| | | | | |

(Parenthesis ( ) indicate revenue decreases)

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY25 | FY26 | FY27 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|---|---|---|---|---|---|---|
| **Total** | | | | | | |

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act

**SECTION III: NARRATIVE**

## BILL SUMMARY

Synopsis:

House Bill 290 (HB290) would create the "Vibrant Communities Act."

Section 2(A) puts forth findings by the legislature that lauds the contributions and efforts of nonprofit organizations serving communities in New Mexico. 2(B) finds that the state of New Mexico receives a direct and tangible benefit and considerable value in return when nonprofit organization provide facilities and services to the public that the state otherwise cannot provide and that nonprofit organizations are not under any legal obligation to provide.

Section 3 provides definitions for the Act where the department is Department of Financial and Administration (DFA), and health council includes county, tribal or regional health council. Importantly, it sets forth the definition for "qualifying entity" as an organization that has documented exemption from the federal income tax by the IRS as an organization described in Section 501(c)(3) or Section 501(c)(12).

Section 4 creates, provides guidelines and duties for the "vibrant communities program" to provide public assistance to facilitate the development and funding of public purpose projects. Allows for the promulgation of rules necessary to carry out the provisions of the Act and ensure the protection of public funds. Public assistance is to be provided pursuant to the Act and subject to legislative appropriation and authorization. DFA shall not use money for the Act or program except as directed by the legislature.

Section 5 requires DFA to annually solicit applications. Applications must include: 1) a description of the public purpose the project will address; 2)expected deliverables or outcomes; 3) benchmarks to evaluate the achievement of a public purpose; 4) population served; 5) any state, local, tribal, private or other actors that may have involvement or interest in a public purpose project; 6) amount of public assistance requested, value of available private resources, grants or other funding sources; 7) conflict-of-interest statement that includes all elected official or those related to elected officials on the board or staff of applying entity; 8) any other forms or information as determined by DFA. A preliminary application shall be submitted on a form provided by DFA with the required information. Requires DFA, by April 30 annually, to review preliminary applications and compile a list of entities that meet the application requirements and provide the list of proposed public purpose projects to the governor and legislature. The list must include the location of the proposed public purpose project, and the public assistance requested. DFA shall differentiate projects based on demonstrated need within the community and the proposed safeguards to ensure responsible use of public funds.

Section 6 provides that the legislature will review, approve and appropriate money for the program by specific purpose, and amount per project. It also sets forth the actions DFA needs to take upon legislative appropriation and authorization of a public purpose project. Specifically, DFA is required to (1) enter into contracts with a qualifying entity to provide

public assistance for a public purpose project; (2) make, execute and enforce all contracts necessary to carry out the provisions of the Vibrant Communities Act; (3) provide public assistance to a qualifying entity for a public purpose project; (4) enter into agreements with other state agencies and local governments, as necessary; (5) pursue legal remedies available in the event that a qualifying entity breaches a contract; and (6) require and request all other information needed to ensure that qualifying entities are in compliance with the contracts entered into pursuant to the Vibrant Communities Act. The Section further sets forth the terms required in any contract entered into pursuant to House Bill 290, including that the project will comply with applicable law including the Governmental Conduct Act and the Audit Act, that the state may seek reimbursement or recapture of funds or property in the event the project fails to comply with the Act, a statement that the entity is subject to ongoing reporting on the project, the defined roles of DFA and the qualifying entity, the finance plan detailing the issuance of public assistance and the obligations of the qualifying entity to continue to receive appropriated funds, specifications on how debts will be repaid, if applicable the terms related to certain property or assets, and all other terms DFA deems necessary and proper to protect public funds.

Section 7 outlines the termination clause and requires a 60-day written notice of the termination prior to the completion of the performance.

Section 8 sets forth the annual reporting requirements by DFA to the governor, legislature and legislative finance committee.

Section 9 creates the effective date as the date of the Secretary of State certifies the amendments to the constitution that will be created through the joint resolution (HJR11). HJR 11will require voter approval for the changes to the state constitution as listed below.

A joint resolution proposing to repeal and replace Article IX, Section 14 of the Constitution of New Mexico (also referred to as the Anti-Donation Clause) to allow the state, counties, school districts, and municipalities to make donations of public funds to private persons or private entities for public purposes and to repeal Article IV, Section 31 of the Constitution of New Mexico, which prohibits appropriations for charitable, educational or other benevolent purposes to a person or entity not under the full control of the state.

## FISCAL IMPLICATIONS

As this law does subject the public purpose entities and their employees to the Governmental Conduct Act, there may be some fiscal impact to the State Ethics Commission in that it will have additional individuals under its jurisdiction for enforcement purposes, however, it is not anticipated to have a significant impact.

## SIGNIFICANT ISSUES

Article IX, Section 14 of the New Mexico Constitution (commonly known as the Anti-Donation Clause) prohibits the state and its institutions and instrumentalities, counties, municipalities, and school districts from directly or indirectly lending or pledging their credit and from making any “donation” to a person, association or public or private corporation. Article IV, Section 31 of the Constitution prohibit the state from appropriating money directly to a person or entity that is not under the full control of the state for charitable, educational or other benevolent purposes.

While House Bill 290 provides that the act will only become effective upon certification of a joint resolution repealing and replacing Article IX, Section 14 and repealing Article IV, Section 31, this contingency is unnecessary because the act would not violate the current Anti-Donation Clause. House Bill 290 sets up a new program within DFA to solicit applications for public projects and enter into contracts with selected qualifying entities. The Bill requires DFA to promulgate regulations necessary to carry out the program. Once certain projects are selected, the legislature then review and appropriate money to DFA which is in turn required to enter into contracts, execute and enforce contracts, provide the public assistance to the project, enter into any necessary agreements with state agencies and local government, pursue legal remedies available if a qualifying entity breaches a contract, and require qualifying entities are in compliance with the contracts. House Bill 290 makes clear that public *assistance will only be provided pursuant to a legislative appropriation and the contract entered into between a qualifying entity and DFA*.

The public assistance here would not contravene Article IV, Section 31 of the Constitution, because the appropriation is to DFA (an entity under the full control of the state). Nor do appropriations to state agencies violate the Anti-Donation Clause. Further, DFA's subsequent provision of funds to a qualifying entity would not implicate the current Anti-Donation Clause because House Bill 290 requires DFA to enter into enforceable contracts with a qualifying entity in order to provide public funds. If the government receives something of value in exchange for its provision of public funds—which, in the language of contract law, is called "consideration"—then there is no donation and, thus, no application of the Anti-Donation Clause. See *City of Raton v. Ark. River Power Auth*., 600 F. Supp. 2d 1130, 1161 (D.N.M. 2008) ("The Court does not believe that the Anti-Donation Clause is implicated when there is true consideration—money exchanged for a real product."); *State ex rel. Office of State Engineer v. Lewis*, 2007-NMCA-008, ¶¶ 50-52, 141 N.M. 1 (concluding an appropriation to purchase and retire water rights not a violation of the Anti-Donation Clause because the state received water rights in return for payment). In order for a contract to be valid, it must have "consideration." Government grant agreements often include the essential elements of a contract (including consideration) and establish what is ordinarily regarded as a contractual relationship between the government and a grantee. In exchange for grant funds, grantees ordinarily agree to: (i) performance of a specific project that the government desires; (ii) prudent management of grant funds; and (iii) satisfaction of conditions required by the grant award instrument, including reports to the government on the use of grant funds. *See generally, e.g.*, *Henke v. U.S. Dept. of Commerce*, 83 F. 3d 1445, 1450 (D.C. Cir. 1996). That set of promises by the grantee is value that government receives in exchange for the grant funds, and the formation of a contract between the government and grantee allows the government, if necessary, to sue to enforce the conditions of a grant agreement. *See generally, e.g.*, *United States v. Marion Cnty. Sch. Dist.*, 625 F.2d 607, 609 (5th Cir. 1980). Therefore, where DFA enters into a valid contract with a qualifying entity, there will necessarily be consideration. *See* State Ethics Comm'n Adv. Op. 2024-06 (Dec. 13, 2024) (available at https://nmonesource.com/nmos/secap/en/19122/1/document.do) (concluding the Indian Affairs Department would not violate the Anti-Donation Clause by entering into an agreement with a private, non-profit Indigenous Center in order to expend appropriated funds from the Legislature for that purpose, so long as the Department received some form of consideration under the agreement or the agreement met an exception under the Clause, such as providing services for the support and maintenance of sick or indigent individuals).

Under the existing constitutional provisions, it is unnecessary in implementing this legislation to repeal and replace Article IX, Section 14 and repeal Article IV, Section 31 because contracts set

up under the specific structure in House Bill 290 would not violate Article IX, Section 14 of the N.M. Constitution as it currently exists and the appropriations contemplated would go directly to a state agency which would not violate Article IV, Section 31. If the joint resolution is passed, however, the only exception to Article IX, Section 14 would be a donation "to accomplish a public purpose" and would require the legislature to enact legislation prior to the donation of any public funds to a private entity or private person.

**PERFORMANCE IMPLICATIONS**

**ADMINISTRATIVE IMPLICATIONS**

**CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

HJR11 is a companion bill that outlines the constitutional amendments requested to be presented to the voters. The result of the proposed amendments on the ballot will affect whether or not this law will be enacted and its effective date.

**TECHNICAL ISSUES**

Section 2 does not contain a definition for the degree of relation of elected officials that a conflict-of-interest statement is required in Section 5(B)(7). That should be defined to prevent any confusion.

**OTHER SUBSTANTIVE ISSUES**

**ALTERNATIVES**

**WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

**AMENDMENTS**