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OPINION
OF
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Opinion No. 88-67

BY: Scott Spencer
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TO: Douglas R. Driggers
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QUESTION:

Whether the contract of employment between the Dona Ana County Commissioners and Charles Russell Lummus, county manager, violates the Bateman Act, Sections 6-6-11 to 6-6-18 NMSA 1978 (Repl. 1987).

CONCLUSION:

No, as long as only the current fiscal years' funds were available and allocated to make payments under this agreement for its entire term. However, the agreement creates unconstitutional debt and purports to bind subsequent commissions and is therefore void.

ANALYSIS:

On February 9, 1988, the Board of County Commissioners of Dona Ana County ("Board") adopted Dona Ana County Commission Resolution 88-08, which authorized an employment agreement ("Agreement") between the Board and Charles Russell Lummus for the position of county manager. Paragraph 2 of the Agreement states, in part, "[T]he term of this Agreement shall begin on January 1, 1988, and shall terminate on December 31, 1989." Paragraph 3 states:

> Notice. Employer agrees to give Employee a minimum of six (6) months notice in the event of its intent not to renew Employee's employment at the natural expiration of this Agreement. Unless a new Employment Agreement is executed, or the terms of the present Agreement extended in writing and signed by both parties, at the natural expiration of this Agreement, any continued employment shall be construed to be on a month-to-month basis. However, if Employee's employment continues on a month-to-month basis, Employer agrees to give Employee a minimum of six (6) months notice in the event of termination without cause.
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> Employee agrees to give Employer a minimum of six (6) months notice in the event he does not desire to renew his employment at the natural expiration of this Agreement or during any period following the natural expiration of this Agreement while employed on a month-to-month basis.

Paragraph 4 of the Agreement states, in part: "For all services rendered by the Employee under this agreement, the Employer shall, effective July 1, 1988, compensate the Employee the salary of $55,000 per annum, payable in 26 equal payments to coincide with the County's biweekly pay periods, beginning with the first pay period in July of each year". Paragraph 9 states:

> Termination. The Employer may terminate this Agreement for cause at any time, but only in the event that the Employee is convicted of a criminal offense involving moral turpitude, files for bankruptcy under any of the provisions of the Bankruptcy Act, commits a serious infraction of a Dona Ana County rule or policy, fails without cause to perform his duties, becomes drug or alcohol dependent or is committed for detoxification or mental incompetency. Termination under this paragraph shall be subject to the provision of procedural due process by the Employer.
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> Employer may terminate this agreement without cause at any time if the Board of County Commissioners of Dona Ana County decides, by a unanimous vote of all five commissioners, that it is in the best interests of Employer to so

> terminate this agreement. Employer agrees, upon such termination without cause, to pay Employee a sum equivalent to one half of Employee's yearly salary, said payment to be made at the end of the bi-weekly pay period during which notice of termination is given.[1]

Paragraph 11 states:

> "Bateman Act". It is understood and agreed by and between the parties that the Employer's contractual authority is limited by the Bateman Act, Section 6-6-11, NMSA 1978, and that the Employer shall be entitled to terminate this Contract, prior to its natural expiration date, in the event that funds are not available for payment of this Contract. The Employer agrees, however, that this paragraph may not be used by the Employer as a subterfuge to terminate the Employee for reasons other than those specified herein. In the event that the Employer terminates this Contract because of the unavailability of funds, the Employer may not replace the Employee with another individual, or individuals, regardless of the title of such persons(s) for the duration of the period of this Contract.

We have been advised that each member of the current Board was elected in 1986, and their respective terms will expire on December 31, 1988.

1. Bateman Act

Section 6-6-11 of the Bateman Act, Sections 6-6-11 to 6-6-18 NMSA 1978 (Repl. 1987), states:

> It is unlawful for any board of county commissioners, municipal governing body or any local school board, for any purpose whatever to become indebted or contract any debts of any

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1 This paragraph requires a "unanimous vote of all five commissioners" before the Agreement may be terminated without cause. This is contrary to Section 4-38-2 NMSA 1978 which allows the conduct of business by a quorum of the members of a commission.

> kind or nature whatsoever during any current year which at the end of such current year, is not and cannot then be paid out of the money actually collected and belonging to that current year, and any indebtedness for any current year which is not paid and cannot be paid, as above provided for, is void. Any officer of any county, municipality, school district or local school board, who shall issue any certificate or other form of approval of indebtedness separate from the account filed in the first place or who shall at any time use the funds belonging to any current year for any other purpose than paying the current expenses of that year, or who shall violate any of the provisions of this section, is guilty of a misdemeanor.

Section 6-6-12 states:

> Insurance contracts not exceeding five years, lease purchase agreements, lease agreements and contracts providing for the operation, or provision and operation, of a jail by an independent contractor entered into by a local public body set out in Section 6-6-11 NMSA 1978, are exempt from the provisions of Section 6-6-11 NMSA 1978, and such contracts, lease purchase agreements, lease agreements and jail contracts are declared not to constitute the creation of debt.

The legislature enacted the Bateman Act to require municipalities to live within their annual incomes. City of Hobbs v. State ex rel. Reynolds, 82 N.M. 102, 476 P.2d 500 (1970). Courts have held that a debt, which can include service contracts, does not violate the Bateman Act if funds are available and allocated to pay the debt when it was incurred. National Civil Serv. League v. City of Santa Fe, 370 F.Supp. 1128 (D.N.M. 1973); Cathey v. City of Hobbs, 85 N.M. 1, 508 P.2d 1298 (1973); Capitol City Bank v. Board of Comm'rs, 27 N.M. 541, 203 P. 535 (1921). For example, in National Civil Serv. League, the City of Santa Fe passed a resolution on December 15, 1971 to pay for the plaintiff's contractual services. The contract provided that the plaintiff would draft a municipal ordinance for $21,000, payable within thirty days after delivery of the ordinance. The resolution "allocated" sufficient funds to pay for the contract. On February 8, 1972, the plaintiff delivered a draft of the ordinance and the city adopted it on February 18, 1972 with a few minor modifications. The city refused to pay the plaintiff, however,

because the 1971 funds that it allocated to the contract were no longer available. The court rejected this defense:

> The city has not shown that the funds were unavailable at the time that resolution 1971-50 was duly passed by the city council to pay for the contractual services of the plaintiff. Indeed, the fact that the sum of $21,000.00 was specifically allocated for these services at the time, from 'local' funds (Presumably the city budget and treasury) and from 'model cities' funds (over which the city was given financial control and supervisory authority), belies any inference that the funds were not available. That these funds may have been diverted from the allocation to pay for the plaintiff's services and are not now readily available for this purpose is of no import. It appears that the funds were available and actually allocated at the time that the resolution was made. This is sufficient. Capital City Bank v. Board of Commissioners, 27 N.M. 541, 203 P. 535, 536 (1921), is still the law in New Mexico and is dispositive of any question of the Bateman Act's application in this case.

Based on these authorities, it is our opinion that the Agreement does not violate the Bateman Act as long as sufficient funds were available and allocated on February 9, 1988 to cover the entire financial obligation of the city under the contract.[2]

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2 In Cathey v. City of Hobbs, the city entered into a personal services contract with an engineer. The contract required the engineer to produce plans for a sewage disposal plant. Taxpayers brought an action to prevent the city from paying for the plans, alleging that the city was violating the Bateman Act by attempting to pay for an earlier year's debt out of the current year's funds. The court held that city did not violate the Bateman Act, because the debt could have been paid at the time the parties entered into the contract. This case and other authorities indicate that even if funds originally made available to pay a debt are misappropriated and are no longer available, the Bateman Act is not violated. However, we advise that funds actually be allocated, committed or encumbered at the time the contract is executed to avoid any question as to their availability.

2. Constitutionality.

Even though the Agreement may comply with the Bateman Act, we believe it creates an unconstitutional debt. Article IX, Section 10 of the New Mexico Constitution provides:

> No county shall borrow money except for the following purposes:
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> A. erecting, remodeling and making additions to necessary public buildings,
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> B. constructing or repairing public roads and bridges;
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> C. constructing or acquiring a system for supplying water, including the acquisition of water and water rights, necessary real estate or rights-of-way and easements;
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> D. constructing or acquiring a sewer system, including the necessary real estate or right-of-way and easements; or
>
> E. constructing an airport or sanitary landfill, including the necessary real estate.
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> In such cases, indebtedness shall be incurred only after the proposition to create such debt has been submitted to the qualified electors of the county and approved by a majority of those voting thereon.

In Shoup Voting Mach. Corp. v. Board of Commissioners of Bernalillo County, 256 P.2d 1068, 57 N.M. 196 (1953) the Supreme Court held unconstitutional a statute authorizing county commissioners to purchase voting machines over ten years in annual installments. The Court stated:

> The above section of the constitution unequivocally forbids contraction of any debt for any purpose other than for erecting necessary public buildings or constructing or repairing public roads and bridges, and then, only after

> the proposition to create such debt shall have been submitted to the qualified electors of the county and approved by a majority of those voting thereon.

57 N.M. at 199, 256 P.2d at 1071.

In State ex rel. Capitol Add. Bldg. Comm'n v. Connelly, 39 N.M. 312, 46 P.2d 1097 (1935), the New Mexico Supreme Court defined "debt" in the constitutional sense. The Court quoted with approval from Seward v. Bowers, 37 N.M. 385, 24 P.2d 253, (1933):

> "The idea of 'debt' in the constitutional sense is that an obligation has arisen out of contract, express or implied, which entitles the creditor unconditionally to receive from the debtor a sum of money, which the debtor is under a legal, equitable, or moral duty to pay without regard to any future contingency."

39 N.M. at 318, 46 P.2d at 1100. The court further stated:

> [W]e are convinced that the term [debt] is used ... as comprehending a debt pledging for its repayment the general faith and credit of the state or municipality, as the case may be, and contemplating the levy of a general property tax as the source of funds with which to retire the same.... [T]he debt whose contracting is inhibited is one which may engage the general taxing power of the state or municipality for its repayment.

Id. at 318-19, 46 P.2d at 1100.

In State Office Bldg. Comm'n v. Trujillo, 46 N.M. 29, 120 P.2d 434 (1941), the Supreme Court recognized that a lease that is terminable at will may not be a constitutional debt:

> ... A lease for a term of years for use of property by a city, school district, etc., which does not involve purchase of the property leased and the yearly rental under which can be met within the constitutional limits of annual indebtedness, and wherein such city, etc., may at any time recede without involving any financial liability in so receding, is valid. This is based on the idea that the service charges by the lessor are earned only year by year.... Under such an

> arrangement, the city, etc., is not legally bound to continue payments of rentals, or to raise money therefore....[3]

(Emphasis added.) 46 N.M. at 49; 120 P.2d at 446.

The Court in Trujillo discussed at length its concern that the state in that case would be obliged to continue payment under the contract until the indebtedness was satisfied. The court quoted with approval from Brash v. State Tuberculosis Bd., 124 Fla. 652, 169 So. 218:

> "Only where it can be clearly demonstrated beyond a reasonable doubt that a contemplated scheme of embarkation upon new capital ventures will not immediately or mediately, presently or in futuro, directly or contingently, operate to impose an added burden on the taxing power, or have the effect of impairing the public credit in futuro, will the consummation of such a debt incurring scheme be held authorized, absent the approving voice of the freeholders.... And, in the case of enterprises authorized by the Legislature to be embarked upon through state agencies, a particular scheme of financing will be held to be valid only where it is clearly demonstrable from the specific terms of the financing proposal itself that no tax burden or pecuniary liability of the state to appropriate or pay for the indebtedness about to be incurred will ever arise, or be looked to as security, in whole or in part, for repayment of the borrowed moneys."

46 N.M. at 45, 120 P.2d at 444. The court also stated:

> This would mean, so long as the agencies did not recede from the lease agreements under the one specified condition, that future legislatures would be bound to provide appropriations

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3 Because this agreement did not set out and specify sources other than the general revenues the city for repayment, we assume that the "special fund" doctrine as explained in Trujillo does not apply.

> for payment of rentals. Such would not be within the conception of expense under a lease as current expense; and a legislature cannot tie the hands of another legislature.

46 N.M. at 52, 120 P.2d at 448.

Paragraphs 3, 9 and 11 of the Agreement are attempts by the Commission to bind itself and future boards beyond the current fiscal year. For example, Paragraph 3 requires six months notice of the county's intent to not renew the contract. Paragraph 9, the termination clause, provides a severe penalty for termination without cause. Furthermore, Paragraph 11 contains a so-called "non-substitution" clause which prohibits the county from hiring a new county manager if it terminates the contract for lack of funds.

These provisions, in our opinion, coerce the current and future commissions to continue the contract for its entire term, and effectively eliminate their right to "recede without involving any financial liability in so receding" as required by Trujillo. They indicate that the county, by entering into this agreement,[4] has contracted a debt in the constitutional sense.

In Hamilton Test Systems Inc. v. City of Albuquerque, 103 N.M. 226, 74 P.2d 1102 (1985), the court stated:

> While this court has not been called upon to answer the specific question before us now, we have indicated that any agreement by which a municipality obligates itself to pay out of tax revenues, and commits itself beyond revenues for the current fiscal year, falls within the terms of the constitutional debt restriction....

103 N.M. at 228, 74 P.2d at 1104. Because we have no indication that this debt was ever submitted to the voters for approval, the agreement is void. See Fellows v. Schultz, 81 N.M. 496, 469 P.2d

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4 We note that the mere presence of a nonappropriation clause may not remove an agreement from the purview of the constitution. See McKinley v. Alamogordo Mun. School Dist. Auth., 81 N.M. 196, 465 P.2d 79 (1970). We will scrutinize each agreement to determine whether it contains other indicias of debt that would bring it within the constitutional purview.

141 (1970); Schmoor v. Griffin, 79 N.M. 86, 439 P.2d 922 (1968). The commission must have the full discretion to not make funds available in any subsequent fiscal year to continue with the agreement.

3. Prohibition Against Binding Successor Board.

For consideration during future contracting, please be advised that a majority of jurisdictions recognize the common law rule that presently constituted local governing bodies may not bind their successors in office.[5] See, e.g., Copper Country Mobile Home Park v. City of Globe, 131 Ariz. 329, 641 P.2d 243 (1981); Keeling v. City of Grand Junction, 689 P.2d 679 (Colo. App. 1984); McLaughlin v. Housing Authority of Las Vegas, 68 Nev. 84, 227 P.2d 206 (1951); Sherman v. City of Picher, 201 Okla. 229, 204 P.2d 535 (1949); Bair v. Layton City Corp., 6 Utah 2d 138, 307 P.2d 895 (1957). If the contract addresses legislative or governmental functions or individual discretionary matters, a governmental body cannot bind future commissions unless a statute specifically authorizes it to do so. See Georgia Presbyterian Home, Inc. v. City of Decatur, 165 Ga. App. 395, 299 S.E.2d 900 (1984); Sampson v. City of Cedar Falls, 231 N.W.2d 609 (Iowa 1975); Lafourche Parish Water Dist. v. Carl Heck Engineers, Inc., 346 So. 2d 769 (La. 1977); City of Louisville v. Fiscal Court, 623 S.W.2d 219 (Ky. 1981); Labor Relations Comm'n v. Board of Selectmen, 374 Mass. 619, 373 N.E.2d 1165 (1978); Village of Moscow v. Moscow Village Council, 29 Ohio Misc. 2d 15, 504 N.E.2d 1227 (1984). See also E. McQuillan, Municipal Corporations §29.101 (3rd rev. ed. 1979) ("[I]t is generally held that, independent of statute or charter provisions, the hands of successors cannot be tied by contracts relating to governmental matters.")

Two courts have held that the hiring of a local government's general manager constitutes the exercise of a governmental function, and that employment contracts for these positions must not extend beyond the life of the board unless a statute authorizes such contracts. Morin v. Foster, 45 N.Y.2d 287, 403 N.Y.S.2d 159, 380 N.E.2d 217 (1978); Vieira v. Jamestwon Comm'n, 91 R.I. 350, 163 A.2d 18 (1960). The court in Morin stated that the appointment of a county manager is precisely and unmistakably a govern-

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5 Section 38-1-3 NMSA 1978 states: "In all the courts in this state the common law as recognized in the United States of America, shall be the rule of practice and decision." The common law prevails where no statutory provision applies. Sellman v. Haddock, 62 N.M. 391, 310 P.2d 1045 (1957).

mental matter. 45 N.Y.2d at 293, 403 N.Y.S.2d at 160, 380 N.E.2d at 220. We find the reasoning in these cases persuasive.[6]

An agreement may not be construed to bind any successor Board of County Commissioners, even if it does not incur unconstitutional debt.

The Agreement also contains several provisions which conflict with Section 4-38-19(B) NMSA 1978 insofar as it contains language which binds future boards to the current board's hiring decision. That section provides:

> A board of county commissioners may employ and set the salary of a county manager to conduct the business of the county, to serve as personnel officer, fiscal director, budget officer, property custodian and to act generally as the administrative assistant to do the board, aiding and assisting it in the exercise of its duties and responsibilities.

It can be implied from that section that each board has discretion to hire its own county manager.

In summary, it is our opinion that, while the Agreement does not violate the Bateman Act, it creates an unconstitutional debt of the county, is an illegal attempt to bind future Boards, and contains provisions which conflict with state law. It is therefore void. See Ritchen v. Gerard, 152 P.2d 394, 48 N.M. 452 (1944), DiGesu v. Weingardt, 575 P.2d 950, 91 N.M. 441 (1978).

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6 Other New York cases consistently have held that unless specifically provided by statute or charter provisions, city councils cannot contract away or in any manner limit or impair future councils' discretionary authority over governmetnal or legislative functions. Morin v. Foster, 45 N.Y.2d 287, 403 N.Y.S.2d 159, 380 N.E.2d 217 (1978); Quigley v. City of Oswego, 71 A.D.2d 795, 419 N.Y.S.2d 27 (1979); Murphy v. Erie County, 34 A.D.2d 295, 310 N.Y.S.2d 959 aff'd, 28 N.Y.2d 80, 304 N.Y.S.2d 242, 268 N.E. 771 (1971). Holmes v. Town of Orangetown, 134 Misc. 2d 784, 512 N.Y.S.2d 764 (1987).

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