

## **Opinion No. 70-01**

January 7, 1970

**BY:** OPINION OF JAMES A. MALONEY, Attorney General

**TO:** Edward P. Moya, Chief Local Government Division Department of Finance and Administration Legislative-Executive Building Santa Fe, New Mexico

### **QUESTIONS**

#### **FACTS**

A leasing company leased a diesel loader to a county under a "leasepurchase agreement." After one payment the county was unable to meet any further obligations under the lease agreement. The diesel loader was returned to the leasing company and the leasing company brought suit in Federal District Court against the board of county commissioners. Judgment was entered against the county in the amount of \$ 12,625.60 plus court costs and attorneys fees. Interest is accruing on this judgment in the amount of \$ 72.58 per month until paid. The judgment in this case is over one-year old.

The board of county commissioners of the defendant county has indicated that it will instruct the county assessor to make a special levy and assessment against all the taxable property located within said county in an amount sufficient to pay the above described judgment.

#### **QUESTIONS**

May the board of county commissioners legally levy taxes outside the twenty mill limitation in order to pay this judgment?

#### **CONCLUSION**

No.

### **OPINION**

#### **{\*2} ANALYSIS**

Sections 15-45-4 and 15-45-5, N.M.S.A., 1953 Compilation are the relevant statutory provisions relating to judgments rendered against a board of county commissioners. Because of the importance of these two statutory provisions, we will set them forth in full at this point:

15-45-4. Judgment against county -- Tax levy. -- When a judgment shall be rendered against any board of county commissioners of any county, or against any county officer

in an action prosecuted by or against him in his official name, where the same shall be paid by the county, no execution shall issue upon said judgment, but the same shall be levied and paid by tax as other county charges, and when so collected shall be paid by the county treasurer to the person to whom the same shall be adjudged, upon the delivery of a proper voucher therefor.

15-45-5. Judgment for current expenses -- Tax levy -- Limitation. -- When any final judgment has been or may be rendered against any county, on account of any current expenses of such county, the board of county commissioners at the time of making the first annual levy thereafter in such county may, in their discretion, cause to be levied and collected and may make such levies and collections annually thereafter until a sufficient tax to pay such judgments and costs of suit shall have been levied and collected. Provided, that such levy shall not exceed two [2] mills upon each dollar of taxable property for any one [1] year and the proceeds from such levy shall be kept separate and apart from other county funds and credited to a fund to be known as the judgment fund. And the moneys collected hereunder shall not be used for any purpose except as hereinbefore provided and no levy shall be made except where such judgments are outstanding.

Before proceeding further, it should be pointed out that we have some doubt as to the authority of the county commission prior to the 1968 amendment to the Bateman Act to enter into the type of lease-purchase agreement described above. See Opinion of the Attorney General No. 66-20, issued {3} February 10, 1966 and Section 11-6-6, N.M.S.A., 1953 Compilation. In 1968 our legislature specifically authorized counties to enter into lease-purchase agreements, however, such agreements were declared "not to constitute the creation of a debt." See Section 11-6-6.1, N.M.S.A., 1953 Compilation (P.S.). **See also Optic Publishing Company v. Board of Commissioners of San Miguel County**, 27 N.M. 371, 202 Pac. 124 (1921).

Because the judgment in the above case is a federal judgment which is more than one-year old, it would be very difficult to attack the judgment at this time. Thus, we can only advise that the judgment be paid pursuant to Section 15-45-5, N.M.S.A., 1953 Compilation.

We have been asked if Section 15-45-5, supra, allows a county to exceed the constitutional twenty mill limitation to pay judgments rendered pursuant to Section 15-45-4, supra. In Opinion of the Attorney General No. 68-102, issued October 11, 1968, this office thoroughly discussed when the twenty mill limitation of Article VIII, Section 2 of the New Mexico Constitution could be exceeded. Article VIII, Section 2 of the New Mexico Constitution provides in part:

That taxes levied upon real or personal property for all purposes, except special levies on specific classes of property **and except necessary levies for public debt**, shall not exceed twenty mills annually on each dollar of the assessed valuation thereof. (Emphasis added)

After reviewing relevant authorities, this office concluded "public debt" has been interpreted by the courts to mean judgments arising out of involuntary debt of a political subdivision. This includes tort judgments and possibly condemnation awards. It does not include debts for ordinary current obligation of the county. A judgment arising out of a contractual obligation, may not be placed on the tax rolls if the levy would exceed the twenty mill limitation of Article VIII, Section 2 of the New Mexico Constitution. Thus, under the above facts, it will be necessary for the county to make annual levies within their statutory and constitutional limitations to pay the judgment.

By: Gary O'Dowd

Deputy Attorney General

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