

Opinion No. 72-30

June 28, 1972

BY: OPINION OF DAVID L. NORVELL, Attorney General James B. Mulcock, Jr.,
Assistant Attorney General

TO: The Honorable Raymond G. Sanchez, New Mexico State Representative, 7622 Rio Grande Blvd., N.W., Albuquerque, New Mexico 87107

QUESTIONS

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May the state or one of its political subdivisions enter into a lease-purchase contract for property?

CONCLUSION

Yes, but see analysis.

OPINION

{*52} ANALYSIS

A lease-purchase agreement such as posed here presents two questions -- is it statutorily permissible and is it constitutionally permissible?

The first question is easily disposed of as the Legislature has specifically exempted lease and lease-purchase agreements from the Bateman Act and has provided that such agreements shall not be considered to be "constitutional debts." See Section 11-11-6.1, N.M.S.A., 1953 Comp.

Notwithstanding this legislative declaration, however, it is axiomatic that the Legislature cannot contravene the Constitution, and Article IX, Section 12 of the New Mexico Constitution presents a much more difficult hurdle in authorizing such lease-purchase agreements. A review of the New Mexico Supreme Court's interpretation of this section shows that an obligation is a constitutional debt and is therefore proscribed if:

(1) The obligation unconditionally entitles the creditor to receive a sum of money from the state or one of its political subdivisions, **Raton Water Works Co. v. Raton**, 9 N.M. 70;

(2) The amount of the obligation is fixed, definite and certain at the outset of the agreement, **Seward v. Bowers**, 37 N.M. 385;

(3) The entire amount of the obligation is due at the outset of the agreement creating the agreement, **Raton Water Works Co. v. Raton, supra**;

(4) The obligation makes a long term commitment of the subdivision's resources without the possibility of an earlier termination, **Raton Water Works Co. v. Raton, supra**; and

(5) The funds to be used to retire the obligation will or may come from ad valorem tax revenues, **Henning v. Town of Hot Springs**, 44 N.M. 321.

Contrariwise, it has often been held that if an obligation is to be paid from revenues other than ad valorem taxation, no constitutional debt is created -- the so-called "Special Fund Doctrine." See **State v. Regents of New {*53} Mexico**, 32 N.M. 428; **Seward v. Bowers, supra**; **State v. Connelly**, 39 N.M. 312; **City of Santa Fe v. First National Bank of Raton**, 41 N.M. 130; **Henning v. Town of Hot Springs, supra**; and **State Office Building Commission v. Trujillo**, 46 N.M. 29.

Thus it is our opinion that the New Mexico Constitution and the interpretation given it by our courts allow New Mexico to fit into the "prevailing view that a mere option to purchase property, by a municipality [state, county, etc.], does not create an indebtedness. (Citing cases). Thus, a lease for a year, with an option to the city to continue it from year to year, or to buy at a fixed price, does not incur a liability beyond the revenues of the year, where the rent for the year does not exceed, when added to the other indebtedness, the municipal revenue for the year." *McQuillin Mun. Corp.* (3rd Ed.), § 41.26. Compare *McQuillin, supra*, § 41.15 and § 28.10.

One caveat is in order, however, and it is best stated by the California Appeals Court:

"If a lease or other agreement is entered into in good faith and creates no immediate indebtedness for the aggregate installments therein provided for and each year's payment is for the consideration actually furnished that year, no violation is done to the constitutional provision. If, however, the instrument creates a full and complete liability upon its execution, or if its designation as a 'lease' is a subterfuge and it is actually a conditional sales contract in which the 'rentals' are installment payments on the purchase price for the aggregate of which an immediate and present indebtedness or liability exceeding the constitutional limitation arises against the public entity the contract is void." **Lagiss v. Contra Costa**, 35 Cal. Rptr. 450, 454 (Call. App. 1962).

With particular attention called to this caveat, we again state our opinion that the state or its political subdivisions may enter into a lease-purchase agreement to obtain personal property, but that the validity of such agreements must be determined on a situation by situation basis.