

## Opinion No. 68-23

February 19, 1968

**BY:** OPINION OF BOSTON E. WITT, Attorney General

**TO:** Harry Wugalter, Chief Public School Finance Division Department of Finance and Administration Legislative Executive Building Santa Fe, New Mexico

### QUESTIONS

1. Do the provisions of the School Leasing Law, Sections 77-17-1 through 77-17-14, N.M.S.A., 1953 Compilation, violate any provision of Article IX of the New Mexico Constitution?
2. Does the School Leasing Law violate the provisions of the Bateman Act, Section 11-6-6, N.M.S.A., 1953 Compilation?

### CONCLUSIONS

1. No.
2. No.

### OPINION

#### {\*41} ANALYSIS

A local school board proposes to enter into a lease purchase agreement pursuant to the provisions of the School Leasing Law, Sections 77-17-1 through 77-17-14, N.M.S.A., 1953 Compilation, for the acquisition of a "total energy installation." This installation will be housed in a separate building on school lands leased to a nonprofit organization. It will be powered by natural gas which will produce all necessary heat, lights and most of the air-conditioning used by schools to be constituted by the board of education. The school board will lease the total {\*42} energy installation from the nonprofit corporation under a lease purchase agreement. The lease will be on a year to year basis with an option for the school district to renew for additional terms of one year each.

The constitutionality under Article IX of the New Mexico Constitution and the legality of the project under Section 11-6-6, N.M.S.A., 1953 Compilation, commonly referred to as the Bateman Act, has been attacked by an attorney retained by a member of the school board. Accordingly, this office has been asked its opinion on the constitutionality of the School Leasing Law under Article IX of the New Mexico State Constitution and under the provisions of the Bateman Act.

The School Leasing Law provides that a school district may lease school buildings or other buildings from a nonprofit corporation if the leasing contract contains certain provisions. These provisions have been met by the school board. The land upon which the buildings are constructed may be leased by the school district to the nonprofit corporation for a nominal rental. The nonprofit corporation formed under the School Leasing Law may issue revenue bonds which are secured by the revenues and income derived from the school district. Section 77-17-10 C of the School Leasing Law provides as follows:

"C. Nothing in this section shall be construed to require a school district to levy general ad valorem taxes for the purpose of making lease rental payments under a leasing contract, nor to create an indebtedness on behalf of the school district within the meaning of any constitutional or statutory limitation. Neither shall this section be construed to prohibit a lessee from the levy of general ad valorem taxes to lease rental payments under a leasing contract."

Thus it is clear that the school district is in no way liable to pay rents on the total energy installation beyond any one year period. It is claimed, however, that this type of lease agreement violates Article IX, Section 11 of the New Mexico Constitution.

Article IX, Section 11 of the New Mexico Constitution provides as follows:

"No school district shall borrow money except for the purpose of erecting, remodeling, making additions to and furnishing school buildings or purchasing or improving school grounds or any combination of these purposes, and in such cases only when the proposition to create the debt has been submitted to a vote of such qualified electors of the district as are owners of real estate within the school district and a majority of those voting on the question have voted in favor of creating such debt. No school district shall ever become indebted in an amount exceeding six per cent (6%) on the assessed valuation of the taxable property within the school district shown by the preceding general assessment. (As amended September 28, 1965.)"

In the first place, Article IX, Section 11 has absolutely no relevance to the School Leasing Law as the indebtedness created by the revenue bonds is not that of the school district, but rather the indebtedness of the nonprofit lessor corporation leasing the buildings to the school district. If anyone is to lose, it will be the nonprofit corporation or the bondholders of the revenue bonds, not the school district. However, because of the controversy surrounding this law and because of the often heard objection that revenue bonds constitute a debt, we feel we should briefly discuss the issuance of revenue bonds by local governments.

{\*43} Although there are several earlier decisions, the 1935 decision of the New Mexico Supreme Court in **State ex rel Capitol Addition Bldg., Comm'n. v. Connelly**, 39 N.M. 312, 46 P. 2d 1097, most clearly sets forth what constitutes "indebtedness" under any of the provisions of Article IX of the New Mexico Constitution as follows:

"Speaking of the term 'debt' as used in article 9, § 12, of the State Constitution in *Seward v. Bowers*, we said: 'The idea of a '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 is under a legal, equitable, or moral duty to pay without regard to any future contingency.'

As applied to the constitutional provision interpreted in *Seward v. Bowers*, we disclosed our adherence to the 'special fund' doctrine, and the general faith and credit of the municipality not having been pledged to retire the bonds, nor held subject to be invoked under 'any future contingency' in aid of their retirement, sustained the proposed bond issue against the constitutional attack made upon it.

We reach the same conclusion in the case before us. While it is true that in *Seward v. Bowers* we were concerned with the intended meaning of the word 'debt' as found in article 9, § 12, while here it is its meaning as employed in section 8 of the same article, **we are convinced that the term is used in the same sense in each section, viz., 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.**

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Four sections of article 9 carry debt limitation provisions. Section 8 applies to the state and requires a tax levy and referendum. Section 10 relates to counties, section 11 to school districts, and section 12 to cities, towns, and villages . . . .

\* \* \* \*

As to school districts, section 11 places a debt limitation at 6 per cent, making the assessed value of taxable property within the district 'as shown by the preceding general assessment,' the measure of the amount, as in other cases.

With these obvious implications that the framers of the Constitution were writing and thinking of a debt repayable from the proceeds of a property tax levy against the general assessment rolls, it is easy to believe that the debt whose creation is thus prohibited, or whose amount is so limited, is one pledging the general faith and credit of the state or other subdivision, with a consequent right in the holders of such indebtedness to look to the general taxing power to satisfy the same." *Id.* at 318-319 (Emphasis added).

See also **Village of Deming v. Hosdreg**, 62 N.M. 18, 26, 303 P. 2d 920 (1956) (issuance of industrial revenue bonds by municipality do not constitute creation of a debt) and **State v. New Mexico State Authority**, 76 N.M. 1, 16, 411 P. 2d 984 (1966). Revenue bonds cannot in any way be considered as "indebtedness" under Article IX of the New Mexico Constitution unless the general credit of the state or other subdivision is pledged. Furthermore, lease purchase agreements which are not secured by a

pledge of the general faith and credit of the state or other subdivision cannot be considered as {<sup>\*44</sup>} "indebtedness" under Article IX of our Constitution.

Thus it must be concluded that the contention that issuance of revenue bonds under the School Leasing Law violates Article IX of the New Mexico Constitution because it involves an unconstitutional creation of debt, is wholly without merit. We therefore turn to the second question, the alleged violation of the Bateman Act.

Prior to the Second Session of the Twenty-Eighth Legislature, Section 11-6-6, N.M.S.A., 1953 Compilation, commonly referred to as the Bateman Act, provided as follows:

"After March 12, 1897, it shall be unlawful for any board of county commissioners, city council, town trustees, board of education, board of trustees, or board of school directors of any school district, for any purpose whatever to become indebted or contract any debts of any 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 and all kind of indebtedness for any current year which is not paid and cannot be paid, as above provided for is hereby declared to be null and void, and any officer of any county, city, town, school district or board of education, 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 fund 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, shall be deemed guilty of a misdemeanor and upon a conviction thereof shall be fined not less than one hundred (\$ 100) nor more than one thousand dollars (\$ 1,000) or be confined in the county jail for a period of not more than six (6) months or by both such fine and imprisonment, in the discretion of the court trying the case."

In Attorney General Opinion No. 66-20, issued February 10, 1966, this office said that the Bateman Act did not prohibit municipalities and counties from entering into long term lease agreements. Section 6-5-31 B, N.M.S.A., 1953 Compilation (P.S.) exempted lease purchase agreements and lease agreements from the provisions of the Bateman Act.

The Second Session of the Twenty-Eighth Legislature has enacted a new section in the Bateman Act Section 11-6-6.1 which provides as follows:

"Insurance contracts not exceeding five years, lease purchase agreements and lease agreements entered into by a local public body set out in Section 11-6-6, New Mexico Statutes Annotated, 1953 Compilation and such contracts, lease purchase agreements and lease agreements are declared not to constitute the creation of debt."

We therefore must conclude that the Bateman Act does not prohibit a school district from entering into long term leases.

By: Gary O'Dowd

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