

**April 19, 2005: Intergovernmental Agreement Between the Jemez Pueblo and
Dona Ana County**

The Honorable Mary Kay Papen
New Mexico State Senator
904 Conway Ave.
Las Cruces, NM 88005

**RE: Opinion Request on Intergovernmental Agreement Between the Jemez Pueblo
and Dona Ana County**

Dear Senator Papen:

You requested our advice on whether Dona Ana County could lawfully enter into an agreement with the Jemez Pueblo that attempted to bar future county commissions from changing the agreement. You provided a copy of the Intergovernmental Agreement Between the Jemez Pueblo and Dona Ana County ("Agreement"), and drew our attention to the following provision:

The County, the Pueblo, the Enterprise and the Developer hereby waive any right each may have to commence or maintain any civil action or other proceeding to contest, invalidate or challenge this Agreement, any procedure or proceeding undertaken to adopt this Agreement or any of the actions required or contemplated by this Agreement, or to take any actions, either directly or indirectly, to oppose or in any other way, to initiate, promote or support the opposition of approvals required under this Agreement or to hinder, obstruct or unduly delay any of the actions required or contemplated by this Agreement. . . . In the event of a challenge to the validity of this Agreement by any third party, the County, the Pueblo, the Enterprise and the Developer shall each defend the validity and enforceability of this Agreement in any administrative or judicial proceeding.

Your question requires us to consider this provision in light of the legal restrictions on a county's ability to bind future commissions. As discussed below, we believe that the above provision would likely be found by the courts to be an impermissible attempt to bind successor commissions.

A majority of jurisdictions recognize the common law rule that presently constituted local governing bodies may not bind their successors in office. See, e.g., Keeling v. City of Grand Junction, 689 P.2d 679, 680 (Colo.App.1984) ("A city council, in the exercise of its legislative power, cannot enter into a contract which will bind succeeding city councils and thereby deprive them of the unrestricted exercise of their legislative power."); Bair v. Layton City Corp., 6 Utah 2d 138, 147-148, 307 P.2d 895, 902 (1957) ("In the absence of express statutory provision, such governing bodies, in the exercise of governmental or legislative power cannot make a contract which is binding on the municipality after the end of such governing body's term of office."); 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

ted by contracts relating to governmental matters."). New Mexico follows this rule. Spray v. City of Albuquerque, 94 N.M. 199, 201, 608 P.2d 511, 513 (1980) (contracts attempting to curtail or prohibit a municipality's legislative or administrative authority are uniformly invalid); State Office Bldg. Comm'n v. Trujillo, 46 N.M. 29, 52, 120 P.2d 434, 448 (1942) (legislature cannot tie the hands of another legislature); see also Dacy v. Village of Ruidoso, 114 N.M. 699, 703, 845 P.2d 793, 797 (1992). This office has taken the same position. Att'y Gen. Op. No. 88-67 (contract of employment between the Dona Ana County Commissioners and county manager impermissibly attempts to bind future commissions, and is therefore void); Att'y Gen. Op. No. 83-05 (county contract with private independent contractor to operate a county jail for period of time extending past the life of the current board of county commissioners impermissible).

N.M.S.A. 1978, Section 4-37-1 provides:

All counties are granted the same powers that are granted municipalities except those powers that are inconsistent with statutory or constitutional limitations placed on counties. Included in this grant of powers to the counties are those powers necessary and proper to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of any county or its inhabitants. The board of county commissioners may make and publish any ordinance to discharge these powers not inconsistent with statutory or constitutional limitations placed on counties.

It appears to the Attorney General that the contract in question deals with issues related to the health, safety and morals of the County and its residents. The contract details, for example, obligations of the County to provide police protection, fire protection and traffic control. The contract appears to bind the County to not take a position in opposition to the location and construction of a gambling casino within the County. The provisions of the contract thus appear to attempt to override the general governmental powers the Legislature has granted to the County, and that may be an impermissible violation of the separation of powers doctrine.

"[A] county is but a political sub-division of the State, and it possesses only such powers as are expressly granted to it by the Legislature, together with those necessarily implied to implement their express powers." *Eldorado at Santa Fe, Inc., v. Board of County Comm'rs*, 89 N.M., 313, 317, 551, P.2d 1360, 1364 (1976). The separation of powers doctrine applies to local governments' attempts to interfere with the powers reserved to the legislature. *Mowrer v. Rusk*, 95 N.M. 48, 52 (1980). It is generally the public policy of New Mexico that a local governing body may not, by contract, curtail its legislative or administrative authority. Cf., Spray, 94 N.M. at 201, 608 P.2d at 513 (referring to "that body of law which limits a municipality's contractual ability because the possibility exists that it may bargain away the sovereign powers delegated to it by the state."). It appears here that the prior county commission has attempted through a contract to deprive a future county commission from exercising a power granted to it by the Legislature.

Since only the Legislature may limit the powers of a county commission, this action by the prior Dona Ana county commission would seem to be legally questionable.

The foregoing does not mean that all long-term commitments of governing bodies (i.e., beyond the term of the current members) are without effect. On the contrary, such commitments are normally altogether enforceable, for the very reason that they do arise pursuant to applicable statutory authority. The most common such provision is the Procurement Code, NMSA 1978, § 13-1-21 through -172 (1984, as amended through 2003), and contracts drafted pursuant to the Code can and do bind future commissions in the acquisition of goods and services. However, in the instant case, based on the information with which we have been provided, we are unaware of any such statutory basis that would permit the former commission to bind its successor commissions as to the general policy-making question at issue here on whether to oppose the siting of a certain gaming casino within the county's jurisdiction.

Further, this Agreement goes beyond merely committing future commissions to a contract executed by its predecessor. Rather, it attempts altogether to restrict future commissions from modifying the Agreement in any respect or challenging any aspect of it. Indeed, it goes even further by requiring future commissions to affirmatively defend the Agreement against any challenge, presumably even a well-founded one. We believe the provision in question so thoroughly "ties the hands" of future commissions, in derogation of the common law and settled jurisprudence that one legislative body cannot bind future bodies on legislative and governmental affairs, that it would likely be found by the courts to be void and unenforceable.

You likewise asked whether the waiver of sovereign immunity in the Agreement adequately protected the county in regard to any civil or criminal relief it might otherwise seek against the Jemez Pueblo, its tribal enterprise or developers. We believe our response to your first question may moot the second one, depending on what the current or any future commission may decide to do. If, for example, they decide to repudiate the current contract, there should be no need to discuss the validity of the purported waiver of tribal sovereign immunity. If subsequent developments prove the question to be germane, we would welcome the opportunity to respond further to that issue.

We hope this response is helpful. If we may be of further assistance, please let us know. You requested a formal Attorney General's Opinion on the matter discussed above. Such an opinion would be a public document available to the general public. Although we are providing our legal advice in the form of a letter instead of an Attorney General Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

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cc: Stuart M. Bluestone, Chief Deputy Attorney General