Opinion

Rob McKenna

Attorney General of Washington

COUNTIES—COUNTY COMMISSIONER—CONTRACT—LEGISLATIVE AUTHORITY—Power Of County Legislative Authority To Enter Into Contract That Binds The County Legislative Authority In The Future

A county legislative authority is generally prohibited from entering into contracts that bind the future legislative actions of the county. The application of this principle depends upon a distinction between actions that are legislative in nature and those that are merely administrative or proprietary.

May 15, 2012

The Honorable Steven J. Tucker
Spokane County Prosecuting Attorney
1115 W Broadway Avenue
Spokane, WA 99260-0270

Dear Prosecutor Tucker:

By letter previously acknowledged, you have requested an opinion from this office on the following questions, paraphrased for clarity:

1. **Are there legal constraints on the power of a county legislative authority to circumscribe the legislative authority of future members of the body by entering into contractual commitments which would remain binding on the county for some period after the end of the terms of the current members of the body?**

2. **Would a series of agreements enclosed in your request, previously executed by the Spokane County board of commissioners, impermissibly bind future members of the board who might wish to change the policy choices represented by the agreements?**

3. **Could a county commissioner be held liable for tortious interference with a contract if the commissioner exercises his/her legislative functions in a manner inconsistent with contractual agreements previously entered by the board of commissioners?**

BRIEF ANSWER

The case law establishes that boards of county commissioners may not take actions that impair the core legislative powers of their successors in office. The law draws a distinction

between "core legislative powers" of a legislative body, and those powers that are more properly described as "administrative" or "proprietary." Legislative bodies may not contractually bind their successors with regard to the former, although they may do so as to the latter. The case law, however, does not establish the precise limits of these constraints. We accordingly respond to your first question by examining the state of the law regarding these constraints.

We respectfully decline to answer your second question. The opinions process is designed to provide legal guidance with respect to issues of law, rather than to resolve disputes regarding specific factual circumstances. In this regard, unlike the judicial process, the opinions process is not suited to gathering and examining all of the facts that may be relevant to a particular situation. We answer your third question by providing guidance relating to the elements of tortious interference.

ANALYSIS

1. Are there legal constraints on the power of a county legislative authority to circumscribe the legislative authority of future members of the body by entering into contractual commitments which would remain binding on the county for some period after the end of the terms of the current members of the body?

The Washington Supreme Court has long noted "the principle that one board of county commissioners cannot enter into contracts binding upon future boards of commissioners." *State ex rel. Schlarb v. Smith*, 19 Wn.2d 109, 112, 141 P.2d 651 (1943). Although the existence of such a limitation on contractually binding the decisions of future county legislative authorities is clear, we noted in an earlier opinion that the parameters of this limitation are not well defined. AGO 1974 No. 21, at 7. The statement is equally true 38 years later.

Applying the principle that contracts cannot bind future boards of commissioners is complicated, because county commissioners constitute the legislative body of the county, but also perform functions that are more properly described as executive or administrative. *See, e.g.*, *Durocher v. King Cnty.*, 80 Wn.2d 139, 152, 492 P.2d 547 (1972) (distinguishing between the legislative and administrative functions of a county legislative authority). For example, the basic powers of a county legislative authority are listed in RCW 36.32.120, and that statute comprises both legislative acts (licensing, levying taxes, enacting police and sanitary regulations) and administrative functions (erecting and repairing county buildings, building and maintaining roads, managing county property).

The clearest principle we can discern from a study of the case law is that county commissioners may not bind the "core" legislative functions of future boards, but do have the authority to enter into contracts or make administrative arrangements that carry out the executive functions of the board, even though some of these arrangements will inevitably limit the freedom of future boards to make different administrative choices. The analytical difficulty is in identifying which county functions are "legislative" in nature.

An authoritative treatise articulates this principle by explaining:

> Respecting the binding effect of contracts extending beyond the terms of officers acting for the municipality, there exists a clear distinction in the judicial decisions between governmental and business or proprietary powers. With respect to the former, their exercise is so limited that no action taken by the governmental body is binding upon its successors, whereas the latter is not subject to such limitation, and may be exercised in a way that will be binding upon the municipality after the board exercising the power shall have ceased to exist.

10A Eugene McQuillin, *The Law of Municipal Corporations* § 29.102 (3d ed. 2009).

Washington cases offer little guidance as to which contractual provisions might be regarded as legislative, and which therefore cannot bind future legislative bodies, and which are administrative or proprietary, and therefore are not so limited. This is because the resolution of specific cases often turns on specific statutory grants of authority, rather than on the application of the general principle that a contract may not bind the future exercise of legislative authority. For example, *Schlarb* concerned an agreement between King and Pierce counties to confine and improve the White River. *Schlarb*, 19 Wn.2d at 111. When King County declined to levy a tax pursuant to the agreement, Pierce County sued to compel action under the contract. King County argued that the contract was against public policy based upon "the principle that one board of county commissioners cannot enter into contracts binding upon future boards of commissioners." *Id.* at 112. The Washington Supreme Court held, however, that the general principle against binding future boards was overcome by a specific statute authorizing counties to contract with one another for the improvement, confinement, and protection of rivers and banks. *Id.* at 113. Although the court recited the rule regarding binding future boards of commissioners, the case was resolved based upon a statutory enactment and therefore provides no guidance regarding your question. *See also Richards v. Clark Cnty.*, 197 Wash. 249, 252-53, 84 P.2d 1009 (1938) (rejecting challenge to issuance of bonds to be repaid by future tax revenue on the basis that the legislature had statutorily authorized counties to commit future revenue to the purpose).

In two cases, our supreme court has entertained challenges to contracts based upon the argument that they were entered into by "lame duck" boards, improperly attempting to bind future commissioners to the arrangement. *Roehl v. Pub. Util. Dist. 1*, 43 Wn.2d 214, 233-34, 261 P.2d 92 (1953); *King Cnty. v. U.S. Merchants' & Shippers' Ins. Co.*, 150 Wash. 626, 274 P. 704 (1929). By concentrating on the "lame duck" issue, neither the *Roehl* nor the *King County* cases offer any significant analysis as to when a contract might impermissibly bind future boards, absent the circumstance of the commitments being made near the end of the current board's term of office. *Roehl*, 43 Wn.2d at 233-34; *King Cnty.*, 150 Wash. at 635; *but see Taylor v. Sch. Dist. 7 of Clallam Cnty.*, 16 Wash. 365, 366-67, 47 P. 758 (1897) (finding rule against contractually binding successors inapplicable because members of a school board served staggered terms, making it a continuous body).

We have also looked to the case law of other states in our effort to define how far a board may go in constraining the policy choices of future boards. In *Kirby Lake Development, Ltd. v. Clear Lake City Water Authority*, 320 S.W.3d 829 (Tex. 2010), developers sued a water control and improvement district over possession of certain water and sewer facilities. One of several theories argued was that the defendant water authority had made contractual commitments which would bind future boards. The Texas Supreme Court rejected this argument as not supported by the facts, but did provide some quotes from earlier cases which shed some light on the principle under examination. The court noted that certain government powers are conferred "for public purposes, and can neither be delegated nor bartered away." *Kirby Lake*, 320 S.W.2d at 843 (quoting *State ex rel. City of Jasper v. Gulf States Utils. Co.*, 144 Tex. 184, 194, 189 S.W.2d 693 (1945)). The court quoted an even earlier Texas case as follows:

> [Municipal] corporations may make authorized contracts, but they have no power, as a party, to make contracts or pass bylaws which shall cede away, control or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties.

Kirby Lake, 320 S.W.2d at 843 (alteration in original) (quoting *Brenham v. Brenham Water Co.*, 67 Tex. 542, 554, 4 S.W. 143 (1887)).

These cases support the notion, implicit but not discussed in the Washington case law, that there is a "core" of public governmental power that cannot be bargained away or compromised by current officeholders to the detriment of their successors in office. *Kirby Lake*, 320 S.W.2d at 843; *see also Inverness Mobile Home Cmty., Ltd. v. Bedford Twp.*, 263 Mich. App. 241, 687 N.W.2d 869 (2004) (Michigan Court of Appeals held that a township could not enter into a consent judgment committing a future township board to amend the township's master plan to permit a manufactured housing development); *Cnty. Mobilehome Positive Action Comm., Inc. v. Cnty. of San Diego*, 62 Cal. App. 4th 727, 73 Cal. Rptr. 2d 409 (1998) (California Court of Appeal found that a county lacked authority to offer a lease committing future county boards not to enact rent control legislation for a period of 15 years).

Finally, we note *Plant Food Co. v. City of Charlotte*, 214 N.C. 518, 199 S.E. 712 (1938), in which the North Carolina Supreme Court found that a city had authority to enter into a ten-year contract to deliver city sewerage sludge to a company that had agreed to dispose of it, notwithstanding that such a commitment to a limited extent compromised the power of future city officers to dispose of sludge in a different manner. The *Plant Food Co.* decision distinguishes, again, between "governmental discretionary powers" which cannot be compromised or suspended (such as "the power to make ordinances and decide upon public questions of a purely governmental character") and the right of a municipality to make contracts in the course of administering its proprietary functions. *See* discussion *Plant Food Co.*, 199 S.E.

at 713-14.[1] The clear implication of the decision was that a contract to dispose of sludge was an administrative act, not a legislative one.

It therefore is reasonable to conclude that a distinction may be drawn between the "core legislative" powers of a legislative body and those powers which are more properly described as "administrative" or "proprietary." The hallmark of the first category is the authority of a legislative body to exercise continuing discretion in the setting of legal standards to govern behavior within the jurisdiction. If a contract impairs this "core" legislative discretion, eliminating or substantially reducing the discretion future bodies might exercise, the courts are likely to find that the contract has improperly impaired the legislative authority of future commissioners. By contrast, counties have, and greatly need, authority to enter into contracts and make administrative decisions concerning the management of public property and the day-to-day conduct of government business. A contract that facilitates public administration, and which places no significant constraint on future policy-making is likely to be upheld.

2. Would a series of agreements enclosed in your request, previously executed by the Spokane County board of commissioners, impermissibly bind future members of the board who might wish to change the policy choices represented by the agreements?

Your second question asks us to apply the principle discussed above to specific agreements enclosed with your request. The opinions process is designed to provide legal guidance with respect to issues of law, but an answer to your second question would include an evaluation of factual circumstances in addition to the legal principles discussed in response to your first question. We do not know to what extent the parties have performed the obligations set forth in the agreements, whether there are any current disputes about performance, or whether other relevant facts or developments might affect the agreements and our legal analysis. For this reason, we respectfully decline to address your second question.

3. Could a county commissioner be held liable for tortious interference with a contract if the commissioner exercises his/her legislative functions in a manner inconsistent with contractual agreements previously entered by the board of commissioners?

Your final question asks about the possibility of liability for tortious interference with a contract. The elements of this tort are set forth in a recent case as follows:

> A defendant is liable for tortious interference with a contractual or business expectancy when (1) there exists a valid contractual relationship or business expectancy, (2) the defendant had knowledge of the same, (3) the defendant's intentional interference induced or caused a breach or termination of

[1] The court also noted that "[t]he line between powers classified as governmental and those classified as proprietary is none too sharply drawn, and is subject to a change of front as society advances and conceptions of the functions of government are modified under its insistent demands." *Plant Food Co.*, 199 S.E. at 714.

> the relationship or expectancy, (4) the defendant's interference was for an improper purpose or by improper means, and (5) the plaintiff suffered damage as a result.

Evergreen Moneysource Mortg. Co. v. Shannon, 274 P.3d 375, 383 (Wash. Ct. App. 2012) (citing *Pleas v. City of Seattle*, 112 Wn.2d 794, 800-05, 774 P.2d 1158 (1989)). Your third question arises from a concern that a county officer might wish to take some future action which could be construed as inconsistent with the commitments the county made in the agreements attached to your request, leading to a concern that such action might result in liability on the part of the officer.

The answer to your question would depend on the facts as they might actually play out, as well as on an evaluation of the meaning and enforceability of the various agreements and an analysis of the background law. To lead to liability, an officer would have to act with knowledge of a valid contractual relationship, must intentionally induce a breach or termination of that relationship, must act for an improper purpose or by improper means, and must cause damages to the person or persons claiming tortious interference. We cannot determine what kind of fact pattern would meet all of those requirements, nor can we completely discount the possibility that under some set of circumstances, the conditions for liability might be met. Under these conditions, it would not be appropriate to attempt an opinion on the matter, and we leave it to county officers and their legal counsel to chart a course of conduct with awareness of the various legal issues presented, including the question of tortious interference.

We trust that the foregoing will be useful to you.

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