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## Coates' Canons Blog: Binding Future Boards

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Article: <https://canons.sog.unc.edu/binding-future-boards/>

This entry was posted on November 25, 2009 and is filed under Board Structure & Procedures, Miscellaneous

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In my **last blog** I said I would address the question of whether, after members-elect take office, the new board can undo things the “lame duck” board has done. This discussion includes the concept of “binding future boards,” although in many cases the legal issue is really about whether a particular commitment is valid, even as to the board that made it. This post describes several specific kinds of actions and discusses whether they are valid when taken, and whether they bind, or can be undone by, a future board. Let’s imagine that the outgoing board:

- 1) Decides to privatize solid waste collection services and signs a 5-year contract with a company to provide these services;
- 2) Negotiates a 5-year contract with the current manager that sets her pay and provides for a generous severance package if she is terminated without cause before the end of the contract term;
- 3) Adopts an ordinance limiting the number of hours per day that a dog can remain tethered; and
- 4) Appoints a new chair of the planning board to replace the current chair, who has announced his resignation as chair effective January 1 of next year.

Let’s assume that each of these actions is quite controversial. Newly-elected members (constituting a majority of the board) wish to undo each of them as soon as they take office in December.

*Which contracts are binding?* The first two actions involve contracts. The concept of “binding future boards” arises in the context of contracting. David Lawrence’s 1990 **Popular Government** article remains the best summary of the law on this issue. The basic principle, as enunciated in the leading case, *Plant Food Company v. City of Charlotte*, is that a contract that “deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired,” is not enforceable. That is, the contract is invalid from the moment it is made because it involves a promise that a board can’t legally make. David’s article summarizes which kinds of promises are off limits. These include legislative and other key policy-making actions. He also notes that since the doctrine is based on public policy (common law) principles, the legislature can, and has, provided specific statutory authority overriding it. For example, cities have **authority to enter annexation agreements**, which involve promises not to annex in areas defined in the agreement.

Cases involving this issue often cite to the proprietary/governmental distinction – the notion being that contracts involving proprietary activities are enforceable and those involving governmental activities are not. But the *Plant Food* case, noting that the line between proprietary and governmental functions is “none too sharply drawn,” holds that it is the nature of the contract itself, not the general subject of the activity that is determinative. So, for example, even if the operation of a sewer system is characterized as a governmental function, a contract for operation of a wastewater treatment plant is in the nature of a proprietary agreement – something that is part of the local government’s business operations – and is therefore enforceable.

So, is the new board bound by either of the contracts described above? Clearly, the first contract is binding. It is a basic commercial agreement. The only way out is through a negotiated termination or breach, either of which will likely cost the unit some money.

The status of the manager contract is governed by state law, as interpreted by the courts. Under parallel **city** and **county** statutes, the manager serves at the pleasure of the board. That means that even if the manager has a contract, she is still terminable “at will” because of the way the statute defines her legal relationship with the board. This is consistent with cases in other states, which hold that an aspect of essential governmental discretion that cannot be contracted away is the



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ability to choose key employees who report to the board itself. See, *Cannizzo v. Berwyn Community Mental Health Bd.*, 741 N.E.2d 1067 (Ill. App., 2000), citing *Mariano & Associates, P.C., v. Board of County Commissioners of the County of Sublette*, 737 P.2d 323, 329 (Wyo.1987). Does this mean the contract with the manager is void? In *Myers v. City of Plymouth*, 135 N.C. App. 707 (1999), the North Carolina Court of Appeals held that the city had authority to contract with a manager, but the nature of the relationship remained “at will” under state law. The court also held, however, that when the subsequent board fired the manager, the city was obligated to pay the lump sum severance amount due under the contract. So a board is not bound to retain the manager, but depending upon the terms of the contract, may incur costs in terminating her. As a final point about extending the contract of a manager who is already employed by the unit, there is some concern that such a contract might be invalid due to a lack of consideration on the part of the manager.

*Undoing the Ordinance.* Underlying the discussion about binding contracts is the basic notion that the governing board exists as a legal entity apart from the changing personnel who serve as its members. This means that the legally valid actions of one board continue in effect as the board personnel changes. Except for contracts that unlawfully attempt to restrict the discretion of the board, the continuity of the board as an entity means that all the actions of the prior board continue in effect. Even so, some of them can be changed. Unlike a contract, which creates an ongoing obligation, many of the other decisions of local boards are basically discretionary policy choices that can be changed, either by the original board that made them, or by subsequent boards, as long as they follow the proper procedures (such public notice or a hearing if, required). The same logic applies to other actions, such as the adoption of a resolution, creation of a committee, or setting of a fee. This is based not on the inability of the prior board to make its action binding, but instead on the inherent discretion the board has to make and change these types of policy choices.

So for example, after adopting the tethering ordinance, either the “lame duck” board or the new board is free to “undo” it by repealing or modifying it. (In this case there are no public hearing or notice requirements that apply.) As noted in David Lawrence’s blog, there are no special rules about this vote; technically it is not a rescission or reconsideration of the original vote, but simply a new matter. It’s important to note that in most cases, such actions have only prospective effects. Violations that occurred while the ordinance was in effect are not necessarily “undone” by the change in or repeal of the ordinance. This is especially true in cases involving land use, and other permitting situations, where rights may vest during the time the ordinance was in effect.

*Making a Future Appointment.* The planning board appointment illustrates the point in Gerry Cohen’s comment to my earlier post. The outgoing board can make future appointments, but only if that board will still be in place when the vacancy actually occurs. If the make-up of the board will be different when the vacancy occurs, the action is considered to exceed the power of the outgoing board because it usurps the power of the board that would be in place at the time of the appointment. (For more on this topic you might want to read **an article by David Lawrence about filling vacancies before they occur** .)

## Links

- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_160A/GS\\_160A-58.21.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-58.21.html)
- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_160A/GS\\_160A-147.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-147.html)
- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_153A/GS\\_153A-81.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-81.html)