

**Opinion No. 57-286**

November 7, 1957

**BY:** OPINION OF FRED M. STANDLEY, Attorney General Alfred P. Whittaker,  
Assistant Attorney General

**TO:** Honorable Earl E. Hartley, State Senator, Curry County, Clovis, New Mexico

**QUESTION**

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May a municipal corporation, having issued street improvement bonds pursuant to law and having pledged a portion of its tax on gasoline and motor fuel to the payment of such bonds in accordance with Laws of 1947, Chapter 122, refrain from placing the proceeds of such tax in the Special Street Improvement Fund until delinquencies actually occur with respect to the bonds secured by the pledge of such revenues?

CONCLUSION

No.

**OPINION**

ANALYSIS

The answer to the inquiry stated depends upon analysis of the provisions and purpose of Chapter 122, Laws of 1947, compiled as §§ 14-46-7 through 14-46-13, N.M.S.A., 1953. We assume from your inquiry that the governing body of a municipality has previously determined that street improvements be made, to be ultimately paid for through the collection of special assessments; that the municipality has actually issued, or now proposes to issue, its Street Improvement Bonds for the purpose of initially financing such street improvements; and that the ordinance relating to the bond issue provides for pledge of revenues derived from the municipal gasoline tax.

Section 14-43-6, N.M.S.A., 1953, 1957 Pocket Supplement, dealing with the proceeds of the municipal tax upon gasoline and motor fuel, provides that such proceeds shall be paid into the municipal treasury for general municipal purposes or for any special purpose in the discretion of the governing body.

Chapter 122 of the Laws of 1947 authorizes the governing body of a municipality collecting the tax upon gasoline and motor fuel to create a "Special Street Improvement Fund" by ordinance directing the payment of a portion of the proceeds of such tax into such fund, for use as a revolving fund and the financing of street improvement projects. When this special fund has been created by ordinance, the moneys of the fund may be

applied by the municipality to the purchase of special assessment assignable certificates or bonds issued in connection with street improvements, the bonds to be held by the fund pending payment of the special assessments (§ 41-46-8). The municipality may also contract for the sale of special assessment certificates or bonds issued for street improvements and for their repurchase with the proceeds of the fund (§ 14-46-9). The municipality may by irrevocable ordinance contract for the annual repurchase of certificates or bonds previously issued, based upon anticipated annual proceeds of the municipal gasoline tax (§§ 14-46-10 and 11). The city may also pledge irrevocably the estimated annual proceeds of the street improvement fund for the prompt payment of street improvement certificates or bonds to be thereafter issued where default in the payment of principal or interest may occur by reason of nonpayment of special assessments (§ 14-46-12). Whether the municipality proposes to contract for the annual repurchase of certificates or bonds, or to pledge the estimated annual proceeds of the street improvement fund for the prompt payment of certificates or bonds to be issued, in either event, the statute contemplates that the ordinance constituting the contract shall be irrevocable during the term of such contract.

Section 14-46-13 provides that after any contract, as above described, shall have been made, it shall be unlawful to fail to credit fuel tax revenues to the Special Street Improvement Fund or to withdraw proceeds of such fund for any purpose other than the performance of such contract, except with written approval of the State Comptroller.

It is apparent from a careful consideration of the foregoing statute that the creation of a Special Street Improvement Fund by the municipality is an exercise of discretion as to the application of proceeds of the municipal tax on gasoline and motor fuel. The ordinance creating such fund may direct that only a portion of the receipts from such tax be placed in the fund, as the governing body may determine. The creation of such fund and its continued existence depends upon the exercise of the legislative power of the governing body of the municipality, in its discretion. The use of the moneys in such fund to purchase newly issued special assessment street improvement assignable certificates or bonds is likewise permissive.

If the governing body of the municipality goes further, however, and makes any contract pledging the use of the moneys of the Special Street Improvement Fund to the payment of proposed special assessment assignable certificates or bonds issued in connection with street improvements, it is clear that the proceeds of the municipal gasoline and motor fuel tax **must** be paid into the Special Street Improvement Fund and used only for the purposes authorized by the statute and the contract into which the municipality has entered.

There is no question about the propriety of the pledge of the moneys of such Special Street Improvement Fund pending satisfaction of the obligation secured. See *Stone v. City of Hobbs*, 54 N.M. 237 (1950); and the New Mexico Supreme Court has strongly indicated that the moneys of such fund do not constitute general funds of the municipality. See *Wiggs v. City of Albuquerque*, 57 N.M. 770 (1953) at page 775.

It follows that the failure of the municipality to create a Special Street Improvement Fund, to pay into such fund the stipulated portion of the proceeds of the municipal gasoline tax, and to apply the moneys of the special fund to the payment of the obligations which the fund secures would constitute a diversion of the moneys of the fund and would contravene the provisions of the statute and presumably those of the ordinance by which the municipality contracted the pledge of such moneys.