

Opinion No. 58-234

December 17, 1958

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

TO: Mr. Ernest W. Bain, Chief, Local Government Division Department of Finance and Administration, Capitol Building, Santa Fe, New Mexico

QUESTION

QUESTION

May a municipal corporation use a part of the proceeds of a general obligation bond issue voted for the construction and extension of the water and sewer systems, to extinguish indebtedness which stems from the performance of earlier work on those systems?

CONCLUSION

No.

OPINION

ANALYSIS

We understand that the indebtedness to which you refer in your inquiry arises from work completed some time ago on the water and sewer systems, and did not arise following authorization and sale of the present bond issue and prior to the taking down of the funds committed, out of work done in reliance on such commitment.

We do not readily find any case which deals with precisely the factual situation which you describe. However, the question really is whether or not such application of a portion of the proceeds of the present bond issue constitutes a diversion of such funds from the purpose for which they were voted. In our opinion, such application of the proceeds would constitute an unlawful diversion of the bond proceeds.

Article IX, Section 9, of the Constitution of New Mexico provides:

"Any money borrowed by the state, or any county, district, or municipality thereof, shall be applied to the purpose for which it was obtained, or to repay such loan, **and to no other purpose whatever.**" (Emphasis added)

The constitutional provision quoted states a principal of law universally recognized. See 15 McQuillin, Municipal Corporations, 3d ed (Callaghan & Co., 1950), § 43.68, p. 598;

64 C.J.S., Municipal Corporations, § 1934, p. 564. The Supreme Court of New Mexico applied this principle, in **Scott v. City of Truth or Consequences**, 57 N.M. 688 (1953), in enjoining a city from diverting funds from the earnings of its utility systems (for the extension of which it had issued revenue bonds to the city's General Fund. And the same principle is embodied in the statutes which authorize municipal corporations of the state to issue general obligation bonds for the construction and extension of water and sewer systems. See § 14-40-21, N.M.S.A., 1953, particularly. Indeed, a municipal ordinance authorizing the issuance and sale of general obligation bonds always and necessarily contains a covenant by the city to use the funds realized from the bond issue **solely** for the purpose for which such bonds were authorized. In the case of general obligation bonds, this rule of law simply recognizes the right of the qualified electors, whose assent is required as a condition precedent to such bond issue (see Art. IX, Sec. 12, New Mexico Constitution), to have the proceeds applied only to the purpose for which they have consented to become indebted and to be taxed.

In our opinion, the application of the proceeds of a bond issue voted for construction and extension of the water and sewer systems, to the payment of pre-existing indebtedness incurred for work done earlier on those systems, was not contemplated by the electors in their consent to the current bond issue, and so constitutes a misapplication of the proceeds of such bond issue as a matter of law. In effect, the city would convert a portion of the present bond issue from one for construction to one for the refunding of pre-existing indebtedness. There is statutory authority for the issuance of refunding bonds by municipal corporations (Laws 1928, ch. 128, compiled as § 11-6-23 through § 11-6-33, N.M.S.A., 1953); but such authority is limited to the purpose of refunding outstanding bonded indebtedness.

There are cases, too, which strongly indicate that a purpose may appear to be closely related to that for which bonds have been issued, and yet fall outside the scope of the authorization. See **Levinthal v. City of Covington**, 49 S.W. (2d) 574 (Ky., 1932), holding that proceeds of a bond issue for the improvement of specified streets did not include authority to purchase intervening property for the extension of one of those streets to the terminus stated in the ordinance authorizing the bond issue; and see **Standard Oil Company of New Jersey v. City of Newark**, 11 A. (2d) 119 (N.J. Eq., 1940), holding that proceeds of a bond issue for airport improvement could not be applied to pay for the cancellation of a lease of a hangar area at the airport in question.

Based upon the authorities cited, and in the absence of a governing statute which would permit such application of the proceeds of the current bond issue, its use to pay pre-existing indebtedness is unlawful, in our opinion.