

Opinion No. 64-153

December 18, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E Payne, Assistant Attorney General

TO: C. R. Sebastian, Director, Department of Finance and Administration, State Capitol Building, Santa Fe, New Mexico

QUESTION

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Under what circumstances can moneys be transferred from the Carlsbad Water and Sewer Revenue Bond Capital Improvement and Replacement Fund to the General Fund of the City?

CONCLUSION

Such a transfer by the city council is permissible if there is full compliance with the statutory and ordinance provisions discussed below.

OPINION

ANALYSIS

In answering your question it is necessary first to examine the pertinent state statute on the matter. The statute here involved is Section 14-39-26, N.M.S.A., 1953 Compilation (P.S.) which provides as follows:

"The revenue derived from the operation of any public utility owned and operated by a municipality, for the purchase, construction, repair, improvement, or enlargement of which the municipality shall have issued revenue bonds, shall be applied in the following priority:

- A. To the maintenance of the public utility in good repair and to the payment of legitimate expense of operation;
- B. To the payment of interest on the revenue bonds so issued for the purchase, construction, repair, improvement, or enlargement of the public utility;
- C. To the creation of a sinking fund and reasonable reserve fund provided by the terms of the resolution authorizing such revenue bonds and the law governing their use; and

D. To the cost of improving and extending such public utility and for the redemption of revenue bonds prior to their maturity, if permitted by the resolution authorizing their issuance."

Provided, however, that when the utility shall annually transfer and set aside into an interest and sinking fund for the retirement of the outstanding revenue bonds, a sum equal to one hundred twenty-five percent of the interest and sinking (fund) requirements for such year, **then any revenue in excess thereof may be transferred to the general fund of the municipality to be expended as the governing body of the municipality shall direct**, and Provided further, that when the balance in the reserve fund thus created shall equal the total amount of interest and sinking funds required for retirement of all such outstanding revenue bonds that the annual transfer to sinking fund shall not be required." (Emphasis added).

Thus the first condition precedent to the transfer of any revenues derived from the operation of the utility here involved to the city's general fund is that the utility has met the requirement of the annual transfer into the interest and sinking fund set out above. If it is determined that this requirement has been met, it is next necessary to examine the provisions of the pertinent municipal ordinances (504 and 572) and ascertain whether there has been compliance therewith.

Section 14 of Ordinance 572 provides as follows:

"Income fund. That so long as any of the bonds herein authorized shall be outstanding, either as to principal or interest, or both, the entire gross income and revenues of the joint system shall be set aside and deposited in an insured bank into a special fund hereby created and to be known as the 'City of Carlsbad Joint Water and Sewer System Gross Income Fund', herein sometimes designated as the 'Income Fund'."

Disbursements from the Income Fund are to be made pursuant to the requirements of Section 15, Ordinance 572. Payments are to be made from the Income Fund to the operation and maintenance fund, to the Interest and Bond Retirement Fund, to the Refunding Reserve Fund, to the Capital Improvement and Replacement Fund and to the City's General Fund.

If the amount in the Bond Fund and the Reserve Fund total a sum at least equal to the entire amount of the authorized outstanding bonds, both as to principal and interest to their respective maturities, and both accrued and not accrued, then no payment into these two funds need be made. Any excess in these two funds and any other moneys derived from the operation of the system may be used in any lawful manner. Further, the Capital Improvement and Replacement Fund is to be stabilized when the balance of the funds therein amount to fifteen per cent of the gross income of the system for the preceding fiscal year, and so long as the balance in the fund shall be of such amount, it is not necessary to increase the fund.

Paragraph H of Section 15 of Ordinance 572 provides that after required payments have been made, from any moneys remaining in the Income Fund "there shall be deposited into the general fund of the city, as the system's contribution to the general operation of the City and in lieu of any payment of general taxes, not less than two per centum of the gross income for the next preceding fiscal year."

Paragraph I of Section 15 provides that:

"After making the payments hereinabove required to be made by paragraphs A to H, both inclusive, of this Section 15 of this ordinance, the remaining income and revenues derived from the operation of the system, if any may be applied to any other lawful purpose or purposes permitted by the constitution and laws of the State of New Mexico."

Until amended in 1955, Section 14-39-26, supra, did not permit any of the revenues derived from municipal owned and operated public utilities to be transferred to the city's general fund. **Scott v. City of Truth or Consequences**, 57 N.M. 688, 262 P.2d 780. However, as amended the Section now specifically authorizes such transfers when all the conditions precedent have been met.

Ordinances 504 and 572 were both enacted after the amendment of Section 14-39-26, supra, in order to take advantage of this enabling legislation.

It requires only a mathematical calculation to determine whether the revenues here in question can be transferred from the Capital Improvement and Replacement Fund. If the proper amount of money has been paid into each of the funds discussed above, then the revenues here in question are surplus funds and can be transferred into the General Fund.