

Opinion No. 65-56

April 5, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Thomas A. Donnelly, Assistant Attorney General

TO: Mr. John C. Hays, Executive Secretary, Public Employees' Retirement Association, 113 Washington Avenue, Santa Fe, New Mexico

QUESTION

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If the Public Employees' Retirement Association is required to foreclose upon any real estate mortgage in order to protect an investment, may such association take title to real estate either in or without the State of New Mexico?

CONCLUSION

Yes, if title is obtained by virtue of foreclosure proceedings of a note and mortgage comprising an investment of the Public Employees' Retirement Association.

OPINION

{*95} ANALYSIS

The Public Employees' Retirement Association of the State of New Mexico was created by Laws 1947, Chapter 167, as amended. By statute, Section 5-5-2 N.M.S.A., 1953 Compilation, the Public Employees' Retirement Association of New Mexico is officially designated as the association for the purpose of fulfilling the Public Employees' Retirement Association Act (Sections 5-5-1 through 5-5-23 N.M.S.A., 1953 Compilation).

Pursuant to express statutory provision the Public Employees' Retirement Board is declared to be the trustee of funds of the Public Employees' Retirement Association. Section 5-5-4.1 N.M.S.A., 1953 Compilation (P.S.) states in part:

"INVESTMENT OF FUNDS. -- The retirement board shall be the trustee of the several funds created by Sections 5-5-1 through 5-5-23 New Mexico Statutes Annotated, 1953 Compilation (being Laws 1953, Chapter 162) and it shall have full power to invest same as follows:

A. Moneys made available for investment may be invested in the following classes of securities and investments:

(1) Bonds, notes, or other obligations of the United States, **or those guaranteed by or for which the credit of the United States is pledged for the payment of the principal and interest** or dividends thereof;

* * *" (Emphasis supplied.)

The above quoted statute authorizes the state association to invest in notes or other obligations of certain types. Since notes are frequently secured by real estate mortgages, on occasion, foreclosure proceedings may be required when a note becomes in default, and title to the real estate securing such note may be taken in the name of the mortgagee and holder of the note.

A careful search of the statutes applicable to the Public Employees' Retirement Association indicates that no specific law expressly declares the association a body corporate or states that it may own real estate in New Mexico, except Section 5-5-4.2 N.M.S.A., 1953 Compilation, which authorizes the association to hold land adjacent to the state capitol grounds. Nevertheless, we interpret Section 5-5-4.1, supra, to invest such authority in the state association by necessary implication. Since the association may by law purchase notes or securities, impliedly the power must exist to hold mortgages to secure and protect the association's investment in such notes.

As pointed out in 81 C.J.S., "States", Section 58, at pages 977-978:

"Generally speaking, state officers, boards, commissions, and departments have such powers as may have been delegated to them by express Constitutional and statutory provisions, **or as may properly be implied from the nature of the particular duties imposed on them . . .**" (Emphasis supplied.)

As noted in **Gallegos v. Conroy** (1934), 38 N.M. 154, 29 P.2d 334, the New Mexico Supreme Court has held that in considering the powers of a state agency "the welfare of the state and the purpose for which the powers were granted must be given primary consideration in the construction of the various statutes relating to the powers of each."

Since the association may hold {*96} a mortgage, we interpret such to mean that the association may also foreclose such mortgage should the note become in default. To hold otherwise would be to vitiate the security for the investment. Inherent in such right we hold is the right to take title to real estate Situate in the state in the name of the State of New Mexico Public Employees' Retirement Association incident to such mortgage foreclosure in cases where the state association bids at the foreclosure sale or takes a deed in lieu of foreclosure.

Since we have concluded that the Public Employees' Retirement Association of the State of New Mexico may properly hold realty within the state incident to a judicial foreclosure sale or by receipt of a deed in lieu of foreclosure, where the public association acts to protect its investment of public funds, we next direct our inquiry to the issue of whether in such situations it may hold title to land in a state other than New

Mexico. The general rule in this respect is set forth in 81 C.J.S., "States", Section 104, at pages 1075-1076:

"A state has the same proprietary rights as a person or has the same proprietary rights as a corporation, and a state acting in a proprietary capacity as an owner of property is bound by the same rules as those which it applies to its citizens. It may acquire property, real or personal, by conveyance, will or otherwise, and hold or apply it to any purpose, public or private, as it sees fit. * * *

LANDS SITUATE IN ANOTHER STATE. A state cannot hold land in another state if the latter state objects thereto, but it may do so with the consent of such other state. Where a state has acquired land in another state with the tacit consent of the latter, its title can be divested only by some proceeding by that state in the nature of the office found, and it cannot be impeached by a private individual in the absence of any action by the state. When a state purchases land in another state from a private person, it holds such land as a subject and not as a sovereign. * * *

As noted above a state may hold title to realty in another state, and where as here, the title is taken solely to protect the security of an investment represented by a note, and incident to foreclosure, or is taken by virtue of a deed in lieu of foreclosure, we are of the opinion that in the absence of express denial of the particular foreign state for the state association to hold such realty in such instances, that the taking of title in a sister state would be proper.