

## **Opinion No. 65-64**

April 19, 1965

**BY:** OPINION OF BOSTON E. WITT, Attorney General James V. Noble, Assistant Attorney General

**TO:** James B. Stapp, City Attorney, P.O. Drawer 1838, Roswell, New Mexico

### **QUESTION**

#### QUESTIONS

1. May municipal funds be expanded directly or through a municipal commission, in promoting the location of private industrial enterprises in or near the municipality?
2. May municipal funds be given to a private nonprofit corporation for the purpose of assisting it to promote the location of private industrial enterprises in or near the municipality, and whose net income, if any, is paid to the city?

#### CONCLUSION

1. See Analysis.
2. No.

### **OPINION**

#### {\*108} ANALYSIS

The first question presented is whether municipal funds can be directly expended in an effort to induce industry to locate in a municipal area. Such funds would be expended by the municipality or a commission thereof.

Article IX, Section 14, New Mexico Constitution provides as follows:

"Neither the state, nor any county, school district, or municipality, except as otherwise provided in the Constitution, shall directly or indirectly lend or pledge its credit, or make any donation to or in aid of any person, association or public or private corporation, or in aid of any private enterprise for the construction of any railroad; provided nothing herein shall be construed to prohibit the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons."

Article IX, Section 12, New Mexico Constitution, as amended, reads as follows:

"No city, town or village shall contract any debt except by an ordinance, which shall be irrevocable until the indebtedness therein provided for shall have been fully paid or discharged, and which shall specify the purpose to which the funds to be raised shall be {\*109} applied, and which shall provide for the levy of a tax, not exceeding twelve mills on the dollar upon all taxable property within such city, town or village, sufficient to pay the interest on, and to extinguish the principal of, such debt within fifty years. The proceeds of such tax shall be applied only to the payment of such interest and principal. No such debt shall be created unless the question of incurring the same shall, at a regular election for councilmen, aldermen or other officers of such city, town or village, or at any special election called for such purpose, have been submitted to a vote of such qualified electors thereof as have paid a property tax therein during the preceding year, and a majority of those voting on the question by ballot deposited in a separate ballot box when voting in a regular election, shall have voted in favor of creating such debt. A proposal which does not receive the required number of votes for adoption at any special election called for that purpose, shall not be resubmitted in any special election within a period of one year. For the purpose, only, of voting on the creation of the debt, any person owning property within the corporate limits of the city, town or village who has paid a property tax therein during the preceding year and who is otherwise qualified to vote in the county where such city, town or village is situated shall be a qualified elector."

There is no question presented as to the use of the Municipal Industrial Revenue Bond Act. The case of **Deming v. Hosdreg Company**, 62 N.M. 18, although primarily concerned with such bonds, considered the above constitutional provisions. The court there held that the constitutional prohibition under Article IX, Section 14, supra, was that of giving aid to a private enterprise for the construction of a railroad **or the giving of a donation to a private corporation**. The Court there stated:

"What we hold is that there is not here present on the record before us a 'donation to or in aid of any \* \* \* private corporation' in violation of Const. Art. IX, § 14, or the 'giving of aid to private enterprise,' **even if** the latter phrase should be read into the questioned provision as a matter of construction. **This, we think, should not be done**, save only where the 'aid or benefit' disclosed, by reason of its nature and the circumstances surrounding it, **take on character as a donation in substance and effect.**" (Emphasis added)

The Court, in that case, held that it was at least incidentally for the public benefit for a municipality to encourage the location of private industry in the municipal area.

The Court held that the issuance of such **revenue** bonds was not the creation of a debt of the municipality within the constitutional meaning. Such portion of the opinion is not here in point.

The case of **Varney v. Albuquerque**, 40 N.M. 90, considered Article IX, Section 12, supra, and held that **a debt** of the municipality for the construction of a public building

could not be incurred except upon a vote which met the minimum requirements of the Constitution and that the legislature could increase such minimum vote requirement.

The case of **State v. Hannah**, 63 N.M. 110 was also concerned with the donation provision of our Constitution. In that case monies were given to individual ranchers to enable them to purchase hay in order to preserve their breeding herds. Eligibility was determined by the United States Government and was not necessarily based upon indigency. The monies were {\*110} paid directly to, or on behalf of, various eligible individuals. The Court found that this was a direct donation and within the constitutional prohibition.

Under the situation now presented, the case of **State v. Hannah**, supra, is distinguishable. Here the monies sought to be expended by the municipality are not being paid to, or directly on behalf of, any individual, firm or corporation. Such a payment would clearly be unconstitutional. However, so long as the monies were expended by the municipality in the performing of planning work, platting work, zoning work, or in contemplation of utility extension or expansion or a street and alley program, conducting surveys in connection therewith and similar related types of activity, and advising various industries of the results of such activities, the expenditures would not fall within the constitutional prohibition against donations. The city, however, could not contract any **indebtedness** for such purpose **without a vote** in compliance with Article IX, Section 9, New Mexico Constitution, and without complying with other constitutional provisions which we need not go into at this time.

The constitutional provisions above cited are not self-executing and statutory authorization to expend monies for such purposes must be found. **Lanigan v. Gallup**, 17 N.M. 627, Municipalities have planning and platting powers. Sections 14-2-1, et seq., N.M.S.A., 1953 Compilation, as amended. Municipalities of ten thousand or more, organized under the commission-manager form of government, have the specific authority to pass all ordinances and measures and do all acts necessary and required for the general welfare of the city. Section 14-10-20, N.M.S.A., 1953 Compilation. Cities, towns and villages are generally authorized to adopt building and zoning regulations to promote health and public welfare, Section 14-28-11, N.M.S.A., 1953 Compilation (P.S.), and to establish and maintain parks, Section 14-35-1, et seq., N.M.S.A., 1953 Compilation, as amended. Municipalities have certain financial powers and duties as set forth in Section 14-46-1, et seq., N.M.S.A., 1953 Compilation. A municipality with a population of 5,000 or over, pursuant to the provisions of Sections 14-44-1 through 14-44-3, N.M.S.A., 1953 Compilation, may levy a tax of one mill per dollar on all taxable property in the municipality in order to create a "Publicity Fund." This levy is in addition to the maximum tax rate otherwise authorized, so long as constitutional limitations are observed. The specific purpose for which said funds may be expended is to advertise the resources of the municipality. No part thereof may be expended except upon warrant of the municipality pursuant to contracts for such purpose entered into by the municipality, and shall not include salaries of any city officer or of any chamber of commerce.

Pursuant to this legislative authority, a municipality otherwise qualified may by ordinance make the levy, create the "Publicity Fund" from its proceeds and enter into contracts and make expenditures therefrom within statutory and constitutional limitations. General fund assets may be used for such purposes in lieu of making the additional levy, since the tax levy called for is general. **State v. Bailey** (Mont.), 44 P.2d 740, Opinion No. 412, p. 453, Report of Attorney General 1955-56. However, the statutory authority of the municipality to expand funds for such purpose is strictly construed. **McQuillan, Municipal Corporations**, 3d Ed., Volume 15, Section 34.07, p. 14.

Additionally, there being no constitutional prohibition, public money of the municipality may be expended for any public purpose authorized by the legislature, and the fact that a private person or concern might incidentally benefit thereby does not prohibit such an expenditure. **McQuillan, Municipal Corporations**, 3d Ed., Volume {111} 15, Section 39.19, p. 36. A municipality has the powers necessarily implied in, or incident to, the powers expressly granted to a municipality, and powers essential to the declared objects and purposes of the municipality.

Section 14-21-3, N.M.S.A., 1953 Compilation, reads as follows:

"FINANCES -- APPROPRIATIONS -- TAXATION -- LICENSES. -- The city council and board of trustees in towns shall have the following powers:

To control the finances and property of the corporation.

To appropriate money for corporate purposes only, and provide for payment of debts and expenses of the corporation.

To levy and collect taxes for general and special purposes on real and personal property.

To fix the amount, terms and manner of issuing and revoking licenses.

To erect all needful buildings for the use of the city or town."

Assuming that the municipality concerned is not incorporated under a charter, Sections 14-44-1 through 14-44-3, supra, contain the only specific authority of a municipality to directly expend money in an attempt to gain industrial enterprises for the general benefit of the municipality. There is no implied power to expend municipal money in an effort to obtain industry, Opinion No. 57-27, p. 36, Reports of Attorney General 1957-58.

In answer to your first question, it is our opinion that a municipality may not expend monies of the municipality for the **primary** purpose of seeking to obtain the location of new industry in the municipal area. However, **so long as no donation is involved**, and so long as the municipality is expending monies for a **legitimate**, legislatively authorized purpose, such as planning or zoning, the fact that an expenditure was incidentally useful

in aiding in the promotion of new industrial locations would not invalidate it. Likewise, it would not be unconstitutional nor would it be in violation of any legislative prohibition.

Your second question involves the granting of money by the municipality to a private non-profit corporation, which expends the monies so received in promoting new industry. Even though all of the profits or net profits of such private corporation are paid to the municipality, such grants would be unconstitutional. See the cases cited earlier, as well as those of **Harrington v. Atteberry**, 21 N.M. 50 and **Hutcheson v. Atherton**, 44 N.M. 144. It was held also in Opinion No. 6223, Report of Attorney General, 1955-56, p. 176, that the City of Albuquerque could not constitutionally contribute to a non-profit corporation known as Aqualantes, Inc., which was organized to aid in necessary legislation concerning the Colorado River Development. Such legislation was presumably to the benefit of Albuquerque.

All of the above authorities hold that the prohibition is not directed to the purpose, no matter how worthy and no matter how beneficial the results of such efforts by the non-profit corporation, might be to the municipality, but the prohibition is directed to the "private" character of the recipient corporation.

The answer to your second question is that a municipality cannot give money to a **private** non-profit organization, even though expended for the public benefit, without violating the Constitution. Article IX, Section 14, supra.

The ordinance, articles of incorporation and by-laws furnished have been examined. The procedures {\*112} set forth for making of recommendations to the governing body of the municipality would not be violation of any constitutional prohibition or in excess of any authority of law. However, any budget items would have to fall within legislative authorization, and it is noted here that advertising budgets under § 14-44-3, supra, are to be submitted by the chamber of commerce. It is also noted that the ordinance calls for recommendations which, if made, could not legally be put into effect by the governing body.

In view of the fact that the answer to the second question is in the negative, no opinion is expressed as to the by-laws or articles of incorporation received. Thus, under the proper procedures and within legal limitations, municipal funds may be expended for advertising the municipality's industrial prospects. Likewise, municipal funds can be expended for legitimate authorized public purposes, such as planning, zoning, etc., even though such might result in incidental benefit in attracting private industry to the municipality.

It is noted that a new municipal code has been enacted by the twenty-seventh legislature, which repeals the provisions of §§ 14-44-1 through 14-44-3, supra, and which does not specifically re-enact these provisions. One of the savings clauses following the repealer (§ 592) provides that any ordinance in effect on the effective date of the Code shall continue except as altered or modified by the Code. The legislation in question is permissive in character, and no specific alteration or modification has been

noted in the Code. However, a general fund appropriation by ordinance would expire at the end of the fiscal year and authority to make a new appropriation would seem to be lacking. It is also noted that the provision for exceeding statutory debt limitations would not apply to use general funds for publicity purposes.