**Opinion No. 81-32**

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**OPINION OF:** Jeff Bingaman, Attorney General

**BY:** Jill Z. Cooper, Deputy Attorney General

**TO:** Honorable I. M. Smalley, New Mexico State Senate, 501 West Pine Street, Deming, New Mexico 88030

## QUESTIONS

May an office building available for general commercial leasing qualify as a "project" under the Industrial Revenue Bond Act, Sections 3-32-1 through 3-32-16 NMSA 1978, if less than half the available space is leased to retail trade?

## CONCLUSIONS

Yes.

## ANALYSIS

Pursuant to the Industrial Revenue Bond Act, Sections 3-32-1 to 3-32-16 NMSA 1978, a municipality is authorized to issue revenue bonds for the purpose of constructing or otherwise acquiring a "project," the revenue from which will be used to pay the principal and interest on the bonds. The interest earned on such bonds may be exempt from federal taxation as provided by 26 U.S.C. § 103.

The definition of a "project" given at Section 3-32-1(B) of the Act contains several provisions which may be read disjunctively to apply to enterprises which incorporate only some of the elements named. **Kennecott Copper Corporation v. Town of Hurley** , 84 N.M. 743, 507 P.2d 1074 (1973). Thus, a "project" may be defined by paragraph (3) of Section 3-32-1(B) to mean property within or near the municipality suitable for use by:

"any business in which all or part of the activities of such business involve the supplying of services to the general public or to governmental agencies or to a specific industry or customer by shall not include establishments primarily engaged in the sale of goods or commodities at retail...,"

A business established to lease commercial space to the public would, under the rule of liberal construction stated at Section 3-32-4 of the Act, constitute a business supplying a service to the public. The Act does not require, for example, that a "project" increase employment. **Kennecott Copper Corporation v. Town of Hurley** , **supra** .

Nevertheless, in order to be included as a "project" under Section 3-32-1(B)(3) a business cannot be "primarily engaged" in retail sales. This limitation on the use of the proceeds of industrial revenue bonds is also expressly recognized in the Act's statements of legislative intent. Section 3-32-4 provides that the Act authorizes a municipality "to acquire, own, lease or sell projects for the purpose of promoting industry and trade other than retail trade ..." See also, Section 3-32-5.

The statutory limitations with respect to retail sales were incorporated into the Act by amendments enacted as laws 1977, Chapter 267 and Chapter 335. Statutes passed at the same session of the legislature and pertaining to the same subject matter must be construed with reference to each other. See e.g., **State v. Clark** , 80 N.M. 340, 455 P.2d 844 (1969). Thus, when properly read together, the general limitation on retail sales expressed by Sections 3-32-4 and 3-32-5 are qualified by the term "primarily engaged" as used in Section 3-32-1(B)(3).

Although a business which leases commercial space is not itself engaged in retail sales, such a business cannot be used as a conduit to enable persons engaged in retail sales to receive the benefit of the use of bond proceeds to which they would not otherwise be entitled under the Act. Cf., **Kirkpatrick v. United States** , 605 F.2d 1160, 1162 (10th Cir. 1979) [construction of "trade or business" provision of 26 U.S.C. § 103(b)(2)(A) governing tax status of industrial development bonds]. Accordingly, Section 3-32-1(B)(3) would require that in order to be funded as a "project," the building cannot be "primarily" leased to persons engaged in retail sales.

As the Act does not define "primarily," the term is to be used in its ordinary and usual sense, in the absence of any legislative intent to the contrary. **State ex rel. Bird v.**

Apodaca , 91 N.M. 279, 573 P.2d 213 (1977). The courts have generally applied this rule in construing provisions which, like Section 3-32-1(B)(3), refer to a business "primarily engaged" in some activity.

In **Board of Governors of the Federal Reserve System v. Agnew** , 329 U.S. 441 (1947), the Supreme Court noted that the term "primarily engaged" would ordinarily mean the main or principal activity of a business or may be determined by some quantitative test, e.g., more than fifty percent. However, the Court found that in the specific context of the Banking Act of 1933 which referred both to a business "primarily engaged" in underwriting and a business "engaged principally" in underwriting, Congress must have intended "primarily" to mean something other than "principally" and therefore defined "primarily" in terms of "substantiality." 329 U.S. at 449.

Thus, the meaning of the term "primarily" depends as well on the context in which it is used. In **South Carolina Public Service Authority v. Federal Power Commission** , 200 F.2d 78, 82 (4th Cir. 1952), the Court noted that the interpretation given the term in **Board of Governors of Federal Reserve System v. Agnew** , **supra** , "took its color" from the purpose of the Banking Act. For purposes of the phrase "primarily designed for

navigation purposes" as used on the Federal Power Act, the Court interpreted the term "primarily" to mean "the greater part." **Id** .

In construing the phrase "primarily engaged in the process of manufacturing," the Court in **Ziperstein v. Tax Commissioner** , 178 Conn. 493, 423 A.2d 129, 133 (1979) found that "'[p]rimarily' is defined as meaning 'mainly' or 'principally.'" The Court held that where over two-thirds of the premises, half of the employees' time and two-thirds of the total cost were devoted to manufacturing, the business was "primarily engaged in manufacturing. **Id.**

In construing the phrase "primarily engaged in manufacturing ...," the Court in **Industrial Refrigeration and Equipment Co. v. State Tax Commission** , 242 Or. 217, 408 P.2d 937, 939 (1965) held that "'primarily' means 'chiefly' or 'principally' but that it does not necessarily mean 'over 50 percent.'" In construing the phrase 'engaged primarily in handling and offering for sale children's merchandise," the Court in **Friedman Textile Co. v. Northland Shopping Center** , 321 S.W.2d 9, 15 (Mo. App. 1959) similarly found that "the word 'primarily' was synonymous with 'chiefly,' 'principally,' or 'mainly.'" The Court concluded that "by whatever test is applied--store area, inventory, or volume of business," where only 10% of the space, 14.3% of the inventory and 7.4% of the sales were related to children's merchandise, the store was not "engaged primarily" in selling children's merchandise. 321 S.W.2d at 16-17.

Thus, for purposes of Section 3-32-1(B)(3), the phrase "primarily engaged in the sale of goods or commodities at retail" may be interpreted to mean a facility which is "principally" or "chiefly" devoted to retail sales. The fact that less than half of the available space in a building will be leased for retail sales does not necessarily mean that the business is not "principally" or "chiefly" devoted to retail sales. However, in the context of Section 3-32-1(B)(3), that fact may be sufficient if the amount of space fairly reflects the amount of revenue. That is, so long as that lesser amount of space leased for retail sales does not generate the greater part of the total revenue for the business, the Act may be interpreted to include a business which makes commercial space available for lease to the public as a "project" which may by funded from the proceeds from industrial revenue bonds.

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