

Opinion No. 32-492

July 14, 1932

BY: E. K. Neumann, Attorney General

TO: Hon. Adolf J. Krehbiel, Assistant District Attorney, Clayton, New Mexico.

{*170} Your letter of July 11, 1932, in which you ask our opinion with reference to one phase of Sec. 112-107 of the 1929 Code, particularly as to whether or not the Town Board of Clayton, acting as the Board of Finance, may properly invest money from sinking funds on hand in its own bonds as well as the bonds of other cities, etc., has been received.

Section 112-107, aforesaid, in its pertinent part, is as follows:

"Provided, that said respective boards of finance shall have the power to invest all sinking funds, or moneys remaining unexpended from the proceeds of any issue of bonds or other negotiable securities of said county, city, town, village or school district and all moneys not immediately necessary for the public uses of such county, city, town, village or school district, in bonds or negotiable securities of the United States of America the State of New Mexico or any county, city, town, village or school district of New Mexico, if such county, city, town, village or school district has a taxable valuation of real property for the last preceding year of at least \$ 1,000,000.00 and shall not have defaulted in the payment of any interest or sinking fund obligation or failed to meet any bonds at maturity at any time within five years last preceding."

Under such authority, the Board of Finance of the Town of Clayton may invest money available from sinking funds in bonds or negotiable securities of the United States of America, the State of New Mexico, or any county, city, town, village or school district of New Mexico if such county, city, town, village or school district has a taxable valuation of real property for the last preceding year of at least \$ 1,000,000.00 and shall not have defaulted in the payment of any interest or sinking fund obligation or failed to meet any bonds at maturity at any time within five years last precedings.

Several authorities, particularly Browne and Chamberlain, believe it bad policy, at least to permit a public corporation to invest its sinking funds in its own bonds, for reason it offers no protection to the bond holders, being in effect a borrowing from its sinking fund equal to a diversion of purpose.

In McGinnis v. Board of Trustees, 108 S. W. 290, the Court, while not passing upon the particular fact here involved, in construing a statute which provided that sinking funds, upon order of a school board, might be kept invested or loaned upon ample security, stated "There can be no doubt that it is a much better business policy to use the sinking fund for the redemption of bonds than to loan it out or invest it in other securities. There is always a risk connected with every loan or investment, but there can be no risk in

redeeming outstanding bonds." It is upon this case and the announced policy therein, that the authors, above quoted, base their opinion. Apparently, they rely upon the theory that the sinking fund should always remain intact as collected.

Regardless of these theories, insofar as the investment of sinking funds is concerned, we believe that in this state there is ample authority to invest such funds within the limitations created by the statutes cited.

In McQuillan -- Municipal Corporations 2nd Ed. Vol. 6, Sec. 2505, we find the following statement:

"The sinking funds, however, may be invested in high grade securities, but even though municipal bonds may be purchased, it has been held that bonds issued by the city at the time they are offered for sale by it cannot be purchased."

{*171} This statement is supported by one case, Kelley v. Minneapolis, 65 N. W. 115, which decides the specific point mentioned upon a ground of policy and citing no authority for such decision. This apparently is the only case touching upon this particular subject.

In the same paragraph of McQuillan cited, the learned author states: "If the statute prescribes the method for investing the sinking fund as by advertising for bids such method is exclusive."

In reading the case cited thereunder, 117 Fed. 51, we are led to the conclusion that each particular case is controlled by the statutes of the particular jurisdiction involved, and in each jurisdiction the sinking funds of cities are to be handled, kept, controlled, invested or kept intact and so forth according to the provision of laws relating thereto.

Consequently, we believe that Sec. 112-107 of the 1929 Code is controlling in this state and that, under its broad terms, wherein it states that sinking funds of a town may be invested "in bonds or negotiable securities of the United States, the State of New Mexico or **any county, city, town**, etc., of New Mexico.," a town, in this case the Town of Clayton, may invest its sinking funds in its own bonds. Certainly Clayton is included in the phrase, "any town of New Mexico."

It must be observed that, however, the Town of Clayton cannot invest its sinking funds in its own bonds, unless such town has a taxable valuation of real property for the last preceding year of at least \$ 1,000,000.00, and has not defaulted in the payment of any interest or sinking fund obligations or failed to meet any bonds at maturity at any time within five years last preceding the date of the contemplated purchase.