Opinion No. 4821-0A

December 5, 1945

BY: C. C. McCULLOH, Attorney General

TO: C. R. Sebastian State Comptroller Santa Fe, New Mexico

*{*159}* We are in receipt of your letter of November 26, 1945 together with the enclosed letter from Mr. Mears, in which he asks whether it is necessary in issuing bonds for public buildings to take into consideration the amount of outstanding sewer and water bonds in calculating the 4% debt limit provided by Article 9, Section 13 of the Constitution. Inasmuch as these bonds have not been issued, the best advice I can give you is that attorneys differ. I am enclosing herewith copy of Opinion No. 1891, written by the Honorable Frank H. Patton. In that opinion, he holds that water and sewer bonds are entirely excluded from the limitations contained in both Section 12 and 13 of Article 9. He relies on the case of Lannigan v. Town of Gallup, 17 N.M. 627.

On a careful examination of this case, I find that it is true that the court uses certain language which would seem to sustain Mr. Patton's opinion, since the court there in several instances said that debts for such purposes are exempt or excluded from the 4%, 12 mill limitation. However, the court in the Lannigan case did not have this question before it and so was not intending to rule on such question.

It appears to the writer that the provisions of Article 9, Section 13 are clear. This section first prohibits any city from ever becoming indebted exceeding 4% of the value of taxable property within such city; then it provides that all bonds or obligations in excess of such amount shall be void. The proviso then follows which provides that a city may contract debts in **excess** of such limitation for the purpose of constructing or purchasing a water or sewer system. It is only when the bonds for such purposes are in excess of the 4% that the proviso even applies.

Thus, if the excess was not for sewer or water bonds, the previous clause would apply, making the bonds void.

Going back to the Lannigan case, the court discusses at length the reason for both the limitation and the proviso. The court shows that municipalities are inclined to be over-optimistic as to their future and so overbond themselves causing eventual bankruptcy and severe hardship on the inhabitants. This, the court points out, is the reason for the limitation.

The court then points out that in an arid state water is both essential and expensive, and that the framers of the Constitution realized that it might be impossible to provide water without going over this debt limit. (Sewer bonds are a health measure).

In view of these theories, it would appear to me that the court which decided the Lannigan case would have held that if a city had already bonded itself for a water and sewer system, that it could not exceed the 4% and 12 mill limitation since the need causing the proviso would not then exist, while the danger of bankruptcy still would. See also the case of Henning v. Town of Hot Springs, 44 N.M. 321.

*{*160}* In view of the foregoing, it is my opinion that a city may exceed the 4% limitation provided by Article 9, Section 13 and the 12 mill limitation provided by Section 12 of Article 9 only for the purpose of issuing sewer or water bonds and that it may not exclude the amount of the previously issued sewer and water bonds in calculating the limitation when bonds for other purposes are issued.

I would make one other observation. Mr. Mears calls attention to the fact that $ 4,000.00 of the present bonds are refunding bonds. If these bonds are repayable exclusively from net revenues derived from a municipal utility, and are not based on the faith and credit of the city, they are not debts within the meaning of the above referred to constitutional limitations. See Seward v. Bowers, 37 N.M. 385.

By ROBERT W. WARD,

Asst. Atty. General