

Opinion No. 55-6232

July 25, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: D. M. Smith, Jr., State Comptroller, Santa Fe, New Mexico

On April 28, 1955, you requested the opinion of this office as to the proper disposition of a \$ 48,000.00 balance in the 1927 Special Assessment Paving Bond Fund of the City of Albuquerque. You stated that the City defaulted on the payment of some of its bonds but that action was not commenced within the time prescribed by statute. You ask whether the cash balance may be rebated on a pro rata basis to the property owners who paid their assessments or whether it may be transferred to funds created under the provisions of Ch. 115, Laws of 1953 (Ch. 156, Laws of 1955) or whether the Comptroller may, under the provision of § 11-1-21 of the 1953 Comp., transfer such funds to other municipal funds.

This opinion has been delayed because of the necessity of securing further information from the City of Albuquerque, which was only recently received.

The pertinent sections of our statutes are as follows:

"11-1-21 -- (3) Whenever there shall remain a balance in any interest or sinking fund of any county, municipality, school district or state institution, after the retirement and payment in full of the bonded indebtedness for which such interest and sinking fund was created, the state comptroller (state board of finance) shall have power in his discretion and upon request by the officer or officers having charge of the expenditures of such funds, to transfer any such balance to any other fund and to authorize its expenditure, or to require that such balance be held intact and applied toward meeting the budget requirements for the succeeding fiscal year."

"14-18-9. -- Special assessment funds -- Expenditure. -- All moneys received on any special assessment shall be held by the treasurer as a special fund to be applied to the payment of the improvement for which the assessment was made, and said money shall be used for no other purpose whatever unless to reimburse such corporation for money expended for such improvements."

The relationship between these two statutes was discussed in *Stone vs. City of Hobbs*, 54 N.M. 237, 220 P. 2d 704, where the Court stated:

"Appellant contends that the act infringes against the power and authority of the State Comptroller to transfer public funds. As we view the act, it merely prevents the withdrawal or transfer of funds until the obligation for which the fund is created has been discharged."

§ 14-18-9 was considered by the Supreme Court recently in *Ayers v. Village of Greentree*, No. 5845, decided April 21, 1955. There the Court held that this section prohibited the use of bond monies for the payment of general obligations of the City even though the bonds had not been issued and could never be issued due to lapse of time.

The statutes above quoted, considered in the light of the cases interpreting them, lead us to the conclusion that monies collected to pay bonds and special assessments may not be transferred for other uses until and unless all bonds have been paid in full. A transfer to other paving bond funds is no more authorized than a transfer to the general fund. A pro rata rebate to property holders would likewise violate § 14-18-9, *supra*.

We suggest that this question be placed in your legislative file so that proper remedial action to free this money may be introduced at the next session of the legislature.

By Walter R. Kegel

Assistant Attorney General