

Opinion No. 57-289

November 7, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Alfred P. Whittaker,
Assistant Attorney General

TO: Mr. Robert H. Sprecher, Assistant District Attorney, Fifth Judicial District, Roswell,
New Mexico

QUESTION

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Can a municipality invest funds which were collected in payment of special assessments for street improvements and which are held for the payment of bonds issued in connection with such street improvements, in short term government bonds or other similar securities maturing before the date on which such funds would have to be applied to the payment of principal or interest on the bonds, when such funds must otherwise be held on deposit for eighteen months before they can be applied on the bonds, by the terms of the bonds themselves?

CONCLUSION

Yes, but interest earned belongs to the special fund, and not to the municipality.

OPINION

ANALYSIS

The answer to your inquiry depends upon analysis of the rights and duties of the municipality with respect to funds collected in payment of special assessments levied in connection with public improvements. In considering the matter, we have necessarily assumed that there are no provisions in the bond ordinance, or in the bonds themselves, which would control the answer to the inquiry.

It is settled law in New Mexico that bonds of this nature do not create general obligations on the part of the municipal corporation issuing them, but that the municipality does obligate itself to collect and enforce the special assessments, place the proceeds in a fund for payment of such bonds, and pay such bonds from such proceeds. See § 14-41-3, N.M.S.A., 1953 Comp., and *State v. City of Carlsbad*, 39 N.M. 352, 47 P. 2d 865 (1935).

Since the primary source of security for the bondholder is the fund derived by collection of the special assessments levied upon the property benefited, it is logical that special limitations should be prescribed upon the power of the municipality to deal with such

fund. This the Legislature has done, by providing in § 14-18-9, N.M.S.A., 1953 Comp., as follows:

"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."
(Underscoring added.)

In dealing with this special fund, the municipality must act with all the care of a fiduciary. The Legislature has also made this duty explicit, in § 14-41-4 (A), which provides as follows, in dealing with the situation in which a municipality has levied special assessments for public improvements and has issued bonds for the financing of the same:

"Said cities, towns and villages shall act as the agency for collection of such special assessments and, in so doing, **shall act as trustees** for the benefit of such holders of assignable certificates or bonds. In case any governing body of any city, town or village shall have created more than one improvement district, the funds of each district shall be kept in a separate fund, to be used for the payment of interest and principal."
(Underscoring added.)

This treatment of the municipality as a trustee with respect to funds collected in payment of special assessments is settled in this state and also in accord with the general rule. See *Crist v. Town of Gallup*, 51 N.M. 286, 183 P. 2d 156, on rehearing at 51 N.M. 291; and 63 C.J.S., *Municipal Corporations*, § 1580, p. 1427.

In the case of an express trust, a trustee whose primary duty is to collect and pay over has no authority to invest, if the trust fund can be promptly paid over in discharge of the trust. On the other hand, when the trust fund cannot be applied promptly to the purposes of the trust, the trustee has authority, if not the duty, to invest. See 90 C.J.S., *Trusts*, § 320, p. 505. By assumption, in the situation considered, the municipality cannot apply the fund held to payment on account of the bonds issued for a period of eighteen months. In these circumstances, investment of such funds appears to be contemplated by relevant constitutional and statutory provisions. Art. VIII, Sec. 4 of the New Mexico Constitution provides for the deposit of all public moneys not invested in interest-bearing securities §§ 11-2-7 -- 11-2-33 both require the treasurer of a city or town to deposit the public moneys entrusted to him in one or more banks duly designated as depositories, as therein provided. § 11-2-41 provides that if the treasurer of any city or town shall have on hand more money than can be divided ratably between qualified depositories, he may, with the approval of the proper board of finance, temporarily invest such funds in bonds of the United States or treasury certificates, under regulations prescribed by the state board of finance. (In this connection, the "proper board of finance" referred to in the statute appears to be the municipal board of finance; see § 11-2-5.) § 11-2-7 permits the treasurer of a city or town, in like manner, to invest sinking funds held in connection with bond issues, and other moneys not

immediately necessary for public uses, in securities of the United States of America, the State of New Mexico, and certain political subdivisions thereof.

Our consideration of the provisions of law referred to compels the conclusion that appropriate investment of the proceeds of special assessments held awaiting the time when they can be applied on account of the obligation of bonds thereby secured violates neither the letter nor the spirit of § 14-18-9, any more than the deposit of such funds in a designated depository, which latter is, of course, mandatory if the funds are not invested as authorized by law. However, the scope of the authority to invest is directly limited, in our view, by the requirements of the amortization schedule incorporated in the bond ordinance which governs. It is imperative that the investment be restricted to securities within the class permitted, and which are readily convertible into cash at or prior to the date upon which the special fund will be called on to satisfy principal or interest requirements of the outstanding special assessment bonds. Otherwise, it might be argued that a technical diversion of the fund, at least, had occurred. (For any diversion of special assessment funds, the municipality generally is held liable - see annotation, 107 A.L.R. 1354.)

Finally, in the event that proper investment of the proceeds of special assessments should be made in the manner indicated, it is the opinion of this office that the interest earned by such funds is to be viewed as belonging to the special fund in question, as an increment thereto, in the absence of a dispositive statutory provision. This appears to be the better view under statutes, like ours, which impose upon the city the obligations of a trustee with respect to special assessment funds. See *Lynn v. Longview*, 131 P. 2d 164, 143 A.L.R. 1336 (Wash. 1942), and related annotation.

The foregoing analysis clearly compels the conclusion that special assessment funds as described in the inquiry may be invested subject to the conditions indicated above, and that the interest earned thereon is to be added to the special fund in question.