

## **Opinion No. 57-312**

November 29, 1957

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

**TO:** Mr. Paul W. Robinson, District Attorney, Second Judicial District, County Court  
House, Albuquerque, New Mexico

### **QUESTION**

#### QUESTION

May a municipal corporation which proposes to issue special assessment street improvement bonds, to be secured additionally by a pledge of municipal gasoline and motor fuel tax proceeds, lawfully covenant with the bond holders by ordinance to repurchase and redeem such bonds, first, from special assessments, and second, to the extent necessary, from a special street improvement fund into which the municipal corporation will covenant to deposit gasoline and motor fuel tax proceeds in sufficient amounts to permit redemption and repurchase of the bonds as specified in the governing ordinance?

#### CONCLUSION

Yes.

### **OPINION**

#### ANALYSIS

Although the question, as stated in your inquiry, apparently is intended as a complete and detailed statement of the proposed transaction with reference to which the opinion is sought, we understand that the matter of principal concern is whether a municipal corporation may lawfully provide additional security for the special assessment bonds of the street improvement district by convenient in the bond ordinance providing for the payment of such bonds, first, from the proceeds of special assessments, and second, to the extent necessary, from a special street improvement fund into which the municipal corporation will covenant to deposit gasoline tax proceeds in sufficient amounts to permit redemption of the bonds in accordance with the amortization schedule provided in the ordinance. Accordingly, this office has confined its consideration of your inquiry principally to this aspect of the transaction.

Section 14-43-6, N.M.S.A., 1953, 1957 P.S., dealing with the proceeds of the municipal tax upon gasoline and motor fuel provides for the payment of the proceeds of such tax into the municipal treasury, and authorizes the application of such tax proceeds for

general municipal purposes or for any special purpose in the discretion of the governing body of the municipality.

Section 14-46-7, N.M.S.A., 1953, authorizes the municipality to create and maintain a "Special Street Improvement Fund" by ordinance, and to direct that there shall be credited to such fund ". . . such portion of the receipts from such tax as the governing body may in such ordinance determine necessary . . .". The fund so created is to be used as a revolving fund in the financing of street improvement projects within the municipality.

It is apparent that a municipality creating such a special street improvement fund is merely applying the proceeds of the gasoline tax for a special purpose within the meaning of § 14-43-6, in the exercise of the discretion of the governing authority. The creation of the fund is not mandatory but permissive. The portion of the gasoline tax receipts to be credited to the fund rests completely in the discretion of the governing authorities. Since the municipality has such broad discretion in these respects, it is clear that the municipality may direct the payment into the special fund of a portion of the receipts of a municipal gasoline tax in conditional terms. As we understand it, this is what is intended by the proposal stated in the inquiry.

In the same manner, § 14-46-12 authorizes the governing body of the municipality irrevocably to pledge "**in whole or in part**" the estimated annual proceeds of the special street improvement fund for the full and prompt payment of special assessment bonds to be issued thereafter where default may occur by reason of non-payment of special assessments. Again, it is not mandatory that the governing body of the municipality pledge any part of the estimated annual proceeds of the special fund as security for the bonds to be issued. Accordingly, we find nothing in the statute which would prohibit the conditional pledge of the proceeds of the municipal gasoline tax, to be paid into the special fund and to be used for the redemption and repurchase of outstanding bonds, in the amount necessary to permit full and prompt payment of interest and principal on the bonds as the same become payable in accordance with the redemption schedule incorporated in the governing ordinance. We understand this to be the intent of the proposal stated in your inquiry.

The fact that the exact amount of the gasoline tax proceeds to be paid into the special fund is not stated in the governing ordinance does not impeach the validity of the proposal stated, in our opinion. The amount to be paid into the fund is determinable and will, in fact, be determined readily by comparison of the proceeds of special assessments collected with the principal and interest requirements to be met by the municipality upon the next payment date stated in the governing ordinance.

It may be arguable that the legal effect of the proposal here reviewed would be more properly characterized as an agreement to create a pledge in the future rather than as a present pledge of existing property. In our view, however, the legal effect of the proposal is the conditional pledge of the revenues involved. In either event, it is our opinion that the proposal stated is a limited exercise by the municipality of its powers

with respect to the proceeds of the municipal tax on gasoline and motor fuel and clearly falls within the municipality's statutory authority in that respect.

In this connection, it is important to note that the proposal stated involves the agreement by the bond purchasers to look to the proceeds of the municipal gasoline tax, as additional security for the bonds to be issued, to a lesser extent than the municipality is authorized so to apply the proceeds of such tax. Clearly, there is nothing in the governing statute which forbids the taking of less security than that which might lawfully be required. Such agreement obviously redounds to the benefit of the municipal corporation. The purchase of the provisions of Chapter 122, Laws of 1947, as amended, relating to pledge of the proceeds of the special street improvement fund as additional security for the payment of special assessment bonds, in our opinion, is to make wholly clear that the contract entered into by the municipality with respect to the pledge of gasoline tax revenue, whatever that contract might be, will be thereafter strictly observed by the municipality as required by the Constitution of the United States.

Accordingly, we see no legal objection to the proposal stated in the inquiry.

The foregoing should be viewed as supplementary to Opinion No. 57-286 issued November 7, 1957, and nothing in this opinion is intended to conflict with the earlier opinion cited.