

Opinion No. 60-114

June 17, 1960

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: Fred W. Phelps, Director New Mexico Department of Development Santa Fe, New Mexico

QUESTION

QUESTIONS

1. Under Chapter 234, § 1, Laws of 1955, compiled as § 14-41-31, N.M.S.A., 1953 Comp. (P.S.), defining "project" for the purposes of the New Mexico Municipal Industrial Revenue Bond Act, what qualifications must a business meet in order to qualify as a "project?"
2. Under Chapter 234, § 5, Laws of 1955, now compiled as § 14-31-35, N.M.S.A., 1953 Comp. (P.S.), what is the minimum security for the bonds issued by municipalities under the New Mexico Municipal Industrial Revenue Bond Act?

CONCLUSIONS

1. See analysis.
2. See analysis.

OPINION

{*488} ANALYSIS

The Municipal Industrial Revenue Bond Act, § 14-41-31 et seq., N.M.S.A., 1953 Comp. (P.S.), was enacted in 1955 to provide a means for municipalities in New Mexico to bring out-of-state business into or near such municipalities to be located there. As stated by the Legislature in § 14-41-32, (P.S.), the purpose of the act was to authorize municipalities ". . . to acquire or lease or sell projects for the purpose of promoting industry and trade by inducing manufacturing, industrial and commercial enterprises to locate and expand in this state, promoting the use of agricultural products and natural resources in this state, and promoting a sound and proper balance in this state between agriculture, commerce and industry . . .".

New Mexico is not the first state to enact such a law. Similar statutes have been enacted in at least Alabama, Mississippi, Kentucky, Tennessee, Illinois and Nebraska. These statutes have been held constitutional except in Nebraska. See **Holly v. City of Elizabethton**, 193 Tenn. 46, 241 S.W. 2d 1001, (1951); **Faulconer v. City of Danville**,

313 Ky. 468, 232 S.W. 2d 80, (1950); **Newberry v. City of Andalusia**, 257 Ala. 49, 57 So. 2d 629, (1952); Contra; **State v. York**, 164 Neb. 223, 82 N.W. 2d 269, (1957). The New Mexico statute was held constitutional in **Village of Deming v. Hosdreg Co., Inc.**, 62 N.M. 18, 303 P. 2d 920, (1957).

Under § 14-41-31, a "project" is defined as follows:

". . . 'Project' means any land and, building or other improvements thereon, the acquisition by or for a New Mexico corporation of the assets or stock of an existing business or corporation located outside the state of New Mexico to be relocated within or near the municipality in the state of New Mexico, and all real and personal properties deemed necessary in connection therewith, whether or not now in existence, which shall be suitable for use by the following or by any combination of two (2) or more thereof; (a) Any industry for the manufacturing, processing, {*489} or assembling of any agricultural or manufactured products, and (b) any commercial enterprise in storing, warehousing, distributing or selling products of agriculture, mining or industry, but does not include facilities designed for the sale or distribution to the public of electricity, gas, water or telephone or other services commonly classified as public utilities;. . . ." (Emphasis supplied).

Your first question relates to the meaning of this definition. In essence, you ask whether under this definition a new business may be formed or whether it refers exclusively to existing businesses.

In our opinion, in order for a business to qualify as a "project" under § 14-41-31, it must be an existing business. You will note that this section requires that a "project" include (1) land together with buildings; (2) assets or stock of an existing business located outside New Mexico to be operated by or on behalf of a New Mexico corporation, **and** (3) other real and personal properties. In our opinion, the grammatical construction to be accorded to the word "and" indicates that unless an existing business is acquired there is no valid "project" under the section. To us the plain meaning of the language of this section is clear that all three of the above elements must be present before there is a "project" and one of these elements is a presently existing business located outside New Mexico to be operated by or on behalf of the New Mexico corporation.

Parenthetically, under § 14-41-33, such "project" may be located within or without the corporate limits of the municipality or partially within and without such limits, but in no case more than fifteen miles from such limits.

The statute is not at all clear as to any other minimum economic requirements that must be met by an existing business nor do we feel that it is our position to read any economic factors into this definition not inserted therein by the Legislature. However, it is our opinion that the existing business must be sufficiently sound, economically, to have a reasonable prospect of being capable of paying off the bonds issued by the municipality under the act. This is because of the language of § 14-41-34 which requires that the revenue bonds issued by the municipality under the act shall be payable solely

out of the revenues derived from the "projects" to be financed by the bonds so issued. Such bonds do not constitute an indebtedness of the municipality within the meaning of any state, constitutional or statutory provision and under the statute shall never constitute nor give rise to a pecuniary liability of the municipality or a charge against its general credit or taxing powers. It is clear from this language that the holder of the bond may look only to the revenues derived from the project to receive payment of principal and interest. Reading this language together with § 14-41-31, we feel that the existing business must reasonably be capable of paying off such bonds before it would qualify as a "project" under the act. In other words, the municipality, in our opinion, cannot issue bonds in an amount greater than such amount which the "project" can reasonably be expected to repay to the bondholders from the revenues derived from such project plus necessary expenses for attorneys', engineering and architects' fees, premiums and commissions which the municipality may deem necessary or advantageous in connection with the authorization, sale, and issuance of the bonds, as allowed by § 14-41-34. This means, of course, that a municipality contemplating the issuance of such bonds in order to bring in such a project, must ascertain whether such project can be reasonably expected to produce such revenues as will retire such bonds.

In answer to your second question, {**490*} it is clear that the minimum security for the repayment of principal and interest on any revenue bonds issued under the act is a pledge of the revenues from the project out of which such bonds shall be made payable. Additional security may be secured by a mortgage covering all or any part of the project from which the revenue so pledged may be derived and may be secured by a pledge of the lease of such project from the municipality to the New Mexico corporation which has acquired the assets or stock of the existing out-of-state business. These security provisions are made clear by § 14-31-35. Of course, other additional securities may be pledged by the New Mexico corporation to the bond-holders but in no event can the security pledged be less than a pledge of the revenues out of which such bonds shall be payable.

By: Philip R. Ashby

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